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The American State Reports.

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vol.
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. I.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1888.

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ANNOUNCEMENT.

THIS is the initial volume of a series of reports which commence at the period where the American Reports were discontinued, and are designed to extend into the future without limit. The scope of these reports, and the plan upon which they will be edited and published, will be substantially the same as those of the American Decisions. The number of volumes will be limited to six each year. This number will admit of the selection and insertion of a higher percentage of the original decisions than was possible in the publication of either the American Reports or the American Decisions, while it will not require the publication of anything which is not of permanent and general importance.

The plan which it is proposed to pursue in this series of reports may be considered with respect, first, to the reporting, and second, to the matter to be reported.

In the reporting, an effort will be made,—1. To educe from each opinion all the legal principles therein asserted as necessary grounds of the decision; and to formulate those principles into *syllabi* as clear and terse as possible; 2. To state those facts which, though not disclosed by the court, are necessary to enable the reader the better to comprehend the opinion, and to determine whether any portion thereof was unnecessary to the decision of the cause; 3. To embody in cross-references, at the close of the opinion, citations of parallel and analogous cases reported in the present series or in the American Reports or the American Decisions; 4. To write full and accurate notes to such cases as involve topics which, either from their novelty or importance, are thought worthy of especial consideration.

The matter to be reported will consist of opinions of the courts of last resort in the several states, selected because of their general value to the legal profession in every part of the United States. Decisions which involve local or statutory

questions will not be reported, except when those questions are blended with others too important to be excluded. In that event, no point of the opinion will be omitted. It is true, this may occasionally result in the publication of matter of local value only; but this evil will be more than compensated by the obvious advantages of a complete report. Persons seeing a case cited as reported in the original as well as in this series will naturally and rightfully expect that either citation may be safely cited in support of the same propositions. Furthermore, an opinion from which something is known to be omitted is always viewed with a suspicion which seriously impairs its force as an authority. Doubts will surely arise whether the part omitted may not limit or enlarge that which is inserted, or may not show that the portion published is a mere extrajudicial opinion, not entitled to the rank and credit of a matter necessarily decided.

While, as has been indicated, decisions involving statutory questions will rarely be reported, yet when reported, if the statute is not sufficiently disclosed in the opinion of the court, the clauses under consideration will be set forth, either substantially or in full, in the statement of facts. By this means, the decision can be clearly understood by persons not having access to the original statute, and can be properly applied and conceded the force of authority in every state having similar statutes.

A. C. F.

SAN FRANCISCO, July 27, 1888.

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AMERICAN STATE REPORTS.
VOL. I



CASES .
IN THE
SUPREME COURT
OF
CALIFORNIA.

[IN BANK.]

OAKLAND PAVING COMPANY v. TOMPKINS.

[72 CALIFORNIA, 5.]

TO ENTER PRIMARILY MEANS TO GO IN OR TO COME IN. It also sometimes means to register the essential fact concerning the thing said to be entered.

CONSTITUTIONAL PROVISION REQUIRING AMENDMENTS TO CONSTITUTION TO BE ENTERED on the journals of the senate and assembly is satisfied by the entry on such journals of an identifying reference. The amendment need not be copied in full upon such journal.

MANDATE to require the execution of a contract by a city marshal for street work. Whether the mandate should issue or not depended on the validity of a constitutional amendment, which was assailed on the ground that such amendment had not been entered on the journals of the senate and assembly. The only supposed defect with respect to such entry was the failure to copy the amendment in full on the journals.

C. T. Johns, for the appellant.

J. H. Boalt, *Henry Vrooman*, and *C. T. H. Palmer*, for the respondent.

By Court, **TEMPLE, J.** This case arises from a street assessment in Oakland. The only question submitted is, whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to section 19, article 11, was proposed by the legislature as required by section 1, article 18, of the constitution. That section provides

that amendments may "be proposed in the senate and assembly, and if two thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in the journals, with the yeas and nays taken thereon," etc.

The objection is, that the proposed amendment was not entered in the journal of either house, as required by the constitution.

It was not copied into the journal, but there was entered an identifying reference, such as is always entered in regard to legislative bills; that is, it was proposed as a senate bill, and was referred to by title and number. The yeas and nays were entered as directed. It is agreed that the amendment thus proposed was submitted to the people, and received a very large majority of the votes cast.

This question is not a new one in this court. In *People v. Strother*, 67 Cal. 624, it was the only issue of any importance, and it was squarely decided that the amendment had been constitutionally adopted. This was in bank, and there was no apparent dissent. This decision was in October, 1885, and in the following May, in the case of the *Oakland Paving Co. v. Hilton*, 69 Cal. 479, an opinion was rendered by Justice Thornton, which was concurred in by Mr. Justice McKee, holding to the contrary. The other members of the court who participated in that decision based their concurrence on other grounds.

It is contended that in this condition of the decisions the question ought to be considered an open one. We do not accede to this proposition. In the case of *People v. Strother*, *supra*, the point was squarely presented, was the only one involved, and was plainly and unequivocally decided. We see no reason why it is not entitled to the usual authority of a precedent; nor do we concede that in so deciding there was error. All admit that the constitutional requirement must be strictly performed. But it does not follow from this that the language of the instrument must be understood literally. The same rules of construction must be applied to ascertain what its requirements are, as though it were not mandatory and prohibitory. And we think when an act commanded or authorized may be done in different ways, either of which would be a strict compliance with the terms of the instrument understood in some common and popular sense, either mode may be pursued, unless some reason is discoverable for holding

that one of such modes only will answer. If, for instance, the direction to enter the amendment in the journal is complied with, in some usual and popular sense of the language, either by copying the amendment into the journal, or by placing upon the journal an identifying reference only, either will do, unless the context shows a different intention.

Now the word "enter" primarily means to go in or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of Congress that citizens may enter at the land-office a tract of land, and the expression is repeated in different forms many times. We are often told that a certain horse has been entered for a race, or an animal has been entered at a fair. What is really done in each instance is to make a record of certain important facts for preservation or notice. And such is certainly a very ordinary meaning of the word "enter" when used in this derivative sense; that is, to register the essential facts concerning the thing said to be entered. And we think it may be fully admitted that the most natural and obvious meaning of the word when employed in this derivative sense is to copy, without greatly affecting the argument.

We find near the title-page of nearly every book printed that it has been entered in the office of the librarian of Congress. What is really left with the librarian is the title-page of the proposed book, and this constitutes the entry, although after it is printed the author is now required to present a copy of the book for the congressional library. We sometimes read that a certain play of Shakespeare was entered at Stationers' Hall. We find that the entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word, and of the phrase in which it occurs, might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute in all these and like cases the word "copy" or the phrase "enter at large" for the word "enter," we are conscious at once that a great change has been made. Indeed, the mere fact that the qualifying words "at large," "at length," "in full," do so often accompany the word "enter," is proof that all feel that it is not a synonym of the word "copy."

The language, however, had been construed under the old

constitution, which contained the same words, and under which amendments had been adopted in the mode pursued in this case.

The practice of both houses of the legislature had given this construction to similar language. The joint rules have always required, as also do the rules of the House of Representatives of Congress, that at a certain stage in the passage of a bill it shall be entered on the records of the house. They have always been so entered by identifying reference. The convention itself adopted Cushing's Manual, which employs similar language which is so used that it must be similarly understood.

Many statutes in force at the time the convention was in session employ the language in the same sense: Pol. Code, secs. 254, 656, 4031; Civ. Code, sec. 324.

The convention adopted the language under consideration with knowledge of the practical construction which had been given to the same words under the old constitution, and in view of the established usage of the legislature as to entries in the journals. It knew that the practice had always been to consider similar matters entered on the journals when there was made a simple identifying reference. It knew also of the common usage to which we have referred; and it is fair to presume that it intended the same meaning. Otherwise it would have used some language which would indicate that a different entry was required from that which was habitually made in the journals. In addition to this, we have the authority of both houses, which have declared the proposal duly made, and the amendment duly adopted; of the executive who submitted it to the people; and whatever force there be in the fact that the people acted upon and ratified it.

This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have been apprehended that it might be made to appear that the proposal was duly passed, although lacking the requisite majority, and so it was required that the yeas and nays be entered. But however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other.

As to preserving the identity of the amendment proposed,

there is no greater difficulty in this matter than with reference to bills. That is left to be provided for by the legislature.

The parties agree that in case the amendment was properly adopted the judgment should be affirmed. It is stipulated that in the proceedings there was full compliance, both with the street laws prior to 1880 and with the law of 1885. It is therefore not necessary to decide which law is in force. That question is really stipulated out of the case.

Judgment affirmed.

PATERSON, MCFARLAND, MCKINSTRY, and SHARPSTEIN, JJ., and MORRISON, C. J., concurred.

THORNTON, J., dissented.

ENTERING CONSTITUTIONAL AMENDMENTS IN JOURNALS OF LEGISLATURE. — In the constitutions of many of the American states are provisions authorizing their amendment, and providing, in substance, that amendments may be proposed in the senate and assembly of the state, and if sufficient of the members shall vote in favor thereof, then that the amendment or amendments shall be entered in the journals, with the yeas and the nays taken thereon. In at least three states the question has arisen whether this command to enter the amendments in the journal signifies that they shall be entered in full, or may be satisfied by the entry upon the journals of some reference to the amendments, indicating the action taken thereon.

The question first arose in California, in the case of *People v. Strother*, 67 Cal. 624; and while it was undoubtedly there decided, there is nothing in the case as reported to make known the reasoning upon which the decision was based, nor, indeed, to give any hint of the real subject there under consideration.

The second case was that of *Oakland Paving Co. v. Hilton*, 69 Cal. 479. In that case, the question was considered at great length in the opinion of Mr. Justice Thornton, in which Mr. Justice McKee concurred. But as the question was not essential to the disposition of the case, and as none of the other justices expressed any opinion thereon, that case cannot be regarded as an authority upon the subject, one way or the other. It is sufficient for our present purpose to state that the opinions of justices Thornton and McKee were the reverse of those announced by the court in the case first cited, and also in the principal case.

So far as we are aware, the question first arose in what was known as the *Prohibitory Amendment Cases*, 24 Kan. 700. The court there took a position which went very far toward the judicial indorsement of the doctrine that there is a higher law than the constitution. "The central idea of the Kansas law," said the court, "as of Kansas history, is, that substance of right is grander and more potent than methods and forms. The two important, vital elements in any constitutional amendment are the assent of two thirds of the legislature and a majority of the popular vote. Beyond these, their provisions are merely machinery and forms." As may be inferred from this judicial exordium, the court considered itself at liberty to treat this provision of the constitution as being directory merely. It reached this conclusion

on the ground that the records in the journals were not made by the people, nor even by the legislatures, but by the clerks of the latter; that the concurrence of these clerks in the presentation of a constitutional amendment was not an essential matter; and that any want of the performance of their duties would not be permitted to invalidate an amendment which had confessedly been proposed by the legislature, and submitted to and ratified by the people.

The other case in which the question was considered is that of *Kochler v. Hill*, 60 Iowa, 543. In that case it did not appear that there had been an attempt to ignore the constitutional provision, nor even to accord it the construction given in the principal case. The proposed amendment had been entered upon the journals, but there was a substantial difference in its phraseology as found upon the journals and that found in the amendment as it was submitted to and adopted by the people of the state. The court, however, considered the general question, and reached a conclusion diametrically opposed to that of the supreme courts of California and of Kansas. It argued that while the words "to enter" may not necessarily mean an entry in full, yet that such is their manifest meaning, as found in the constitution of the state; that the object of the constitutional provision was to provide such entries upon the journals of the legislature as should leave no reasonable doubt of the terms of the proposed amendment, and of the action of the legislature thereon; and therefore, that an entry which failed to accomplish these objects was substantially defective; and a constitutional amendment, submitted and voted for in its absence, could not be conceded to have become a part of the fundamental law of the state.

[IN BANK.]

FISK v. CENTRAL PACIFIC RAILROAD COMPANY.

[72 CALIFORNIA, 38.]

MASTER IS NOT ANSWERABLE TO SERVANT for injuries inflicted on him by negligence of another servant in same common employment, and not traceable to personal negligence of master.

SERVANT ASSUMES ORDINARY RISKS of employment, including risk of injury, from neglect of fellow-servants.

ORDER OF EMPLOYEE DIRECTING MINOR EMPLOYEE to undertake a dangerous task without proper advice as to such danger, if it be negligence, is the negligence of the fellow-servant, for which no recovery can be had against the master.

MINOR OR INFANT EMPLOYEE CANNOT RECOVER FOR INJURIES caused by negligence of a fellow-servant.

WHERE NEGLIGENCE OF MASTER, COMBINED WITH THAT OF HIS SERVANT, PRODUCES injury to a fellow-servant, the latter may recover damages of the master.

SERVANT HAVING EQUAL KNOWLEDGE WITH MASTER of the dangerous character of the work upon which he enters assumes the risks thereof.

DUTY OF MASTER TO INFANT OR MINOR EMPLOYEE is to warn and instruct him regarding the dangers of the employment, and the means of avoiding them.

MINOR EMPLOYEE PROPERLY INSTRUCTED CONCERNING DANGERS of his employment thereafter stands on the same plane with other servants, with respect to the risks incident to the employment.

BOSS OF TOOL-ROOM WHOM MINOR EMPLOYEE is instructed to obey has not, arising from such instructions, authority to direct such minor to go into other shops of the same master to look for work; and if such minor employee does go to such shop, and is there placed in a dangerous employment, without proper warning or instructions, and while in such employment is injured, he cannot recover therefor from the master.

Freeman, Johnson, and Bates, for the appellant.

S. C. Denson, for the respondent.

By Court, SEARLS, C. This is an action to recover damages for a personal injury received by plaintiff while in the employ of defendant.

A judgment of nonsuit was entered in the court below, from which judgment, and from an order denying a new trial, the plaintiff appeals.

The defendant is a corporation organized under the laws of the state of California.

At the trial there was testimony tending to show that in September, 1883, the plaintiff, who was of the age of about twelve years, applied to Price Davis, assistant foreman in defendant's boiler-shops in Sacramento, for work, and was informed he would have to see Charles Hooper, the foreman. He saw Mr. Hooper accordingly, who gave him work in the tool-room under David Snape, who was the boss of such room, and whom he was instructed to obey.

His principal work was in cleaning the tools, putting them in place, giving them to the men, doing errands, etc. He also seems to have been engaged for nearly a month in heating rivets.

On the 1st of May, 1884, plaintiff went to the shop, and there being no work for him in the tool-room, he was told by the boss to go into the shop and see if there was anything for him to do there. In the shop he was requested by Price Davis, Jr., a young man aged nineteen, and a son of the assistant foreman, to go into the fire-box of a boiler and wipe a tap, in place of another boy named Downs, who was engaged in the work, and whom, young Davis said, he wanted to help him at something else.

The precise testimony on this point is as follows: —

"I went into the shop and met Price Davis, Jr., and he asked me if I was doing anything; I told him no, I was not doing anything; and he told me that he wanted me to go in and wipe the tap for him. He said he wanted another boy to help him. Before that there was a boy named Downs that

was inside of the fire-box, and Downs was going to help him do some work. I asked him if I could not help do the work, and he said no. He went off and staid about five minutes, and came back and said his father told me to go into the fire-box. . . . He was the son of Price Davis, the assistant foreman," etc.

The tap was being used by one John Soule to drill holes through the fire-box, and to cut threads in them to receive screws, and was propelled by machinery on the outside, which gave to it a revolving motion at the rate of one hundred revolutions a minute.

The office of plaintiff was to receive the tap when it came through, clean it from the particles of iron which adhered to its oiled surface, and pass it outside the boiler to Soule for readjustment.

There were two methods for cleaning the tap; one was to wait until it came entirely through, and was detached from the machine, which was entirely safe, but slow; the other was to wipe it as it came through, and while in motion, which was dangerous.

Plaintiff testifies that Soule "told me to wipe off the tap in a hurry, and told me to wipe it off while it was running."

While engaged in wiping the tap with a piece of coarse cloth, the instrument caught the cloth, which was around the plaintiff's hand, twisted and broke his arm, and injured him severely and permanently.

Plaintiff had previously been employed in a boiler-shop at Oakland, and so informed Hooper, the foreman of the shop, when he applied for work.

Soule was a workman in the shop, and usually had charge of the tap. Plaintiff says: "When I went up to the tap, Soule asked me what I was going to do. I told him I had come to wipe off the tap. He said, 'What are you going to wipe it off with?' I told him with a sack, and he told me to go inside, and he said wipe it off while it is running."

From the nature of the employment and the instrument described in the testimony, we have no doubt of two propositions:—

1. It was dangerous business to wipe the tap while in rapid motion, in the manner pursued by plaintiff.

2. A man of mature years, in full possession of his faculties, and gifted with ordinary ingenuity, could have performed the task while the instrument was in motion, without material risk.

The rule is well settled in England and the United States that the maxim *respondet superior* does not apply so as to make a master responsible for injuries inflicted on one servant by the negligence of another servant, in the same common employment, unless such injuries are traceable to the personal negligence of the master.

The law implies a contract on the part of the servant, when he enters into the service, that he will assume the ordinary risks which are incident to the employment, among which is the risk of suffering hurt and injury from the negligence of his fellow-servants.

The boy (plaintiff) was directed to go into the fire-box to work by Price Davis, Jr., who seems to have been a hand in the shop, who was a son of the assistant foreman, and who told the plaintiff that his father (the assistant foreman) so directed; but there is no evidence to show that the assistant foreman gave any such order.

The order of Soule directing the plaintiff to clean the tool while in motion was improper, but it was the negligence of a fellow-servant engaged in the same general employment.

The rule which excuses a master from liability where an injury is caused by the negligence of a fellow-servant is not altered by the fact that the party injured is a child: *King v. Boston etc. R. R. Corp.*, 9 Cush. 112; *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28; 92 Am. Dec. 282; *Ohio etc. R. R. Co. v. Hammersley*, 28 Ind. 371; *Gartland v. Toledo etc. R. R. Co.*, 67 Ill. 498; *Brown v. Maxwell*, 6 Hill, 592; 41 Am. Dec. 771.

We conclude, therefore, that the plaintiff cannot recover for the injuries which he received, either by being placed by a fellow-servant in a dangerous place, or by the negligence of his fellow-servant in directing him in the manner in which he was to perform his work, unless the negligence of his fellow-servants was in some way combined with the negligence of the defendant, so as to produce the result.

If the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages of the master: *Crutchfield v. Richmond etc. R. R. Co.*, 76 N. C. 320; *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151; *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317.

Was the defendant guilty of any such negligence as rendered it liable?

There is nothing in the testimony to show any negligence in the selection of Soule as an employee, or tending to bring home to the defendant knowledge of his carelessness.

We must, therefore, look to the circumstances under which the plaintiff sought work in the boiler-shop for a basis upon which to determine whether or not defendant, or its servants in authority, were guilty of wrong.

The first question, manifestly, is as to the extent of the authority conferred upon Snape, the boss of the tool-room; and if it shall be found that he possessed the requisite power to bind the defendant by his direction to plaintiff, then, second, we may inquire into the manner in which his authority was exercised.

Recurring to the testimony, we find, — 1. That Snape was boss of the tool-room, presumably connected with the boiler-shop, and as such had charge of the tool-room; 2. That Hooper was foreman of the boiler-shop, and had authority to employ men therein; 3. That when plaintiff applied for work, Hooper employed him to labor in the tool-room, took him to Snape, the boss, and told him to obey the latter, which he did; 4. At the end of eight months, and on the first day of May, 1884, there being nothing for plaintiff to do in the tool-room, he was directed by Snape to go into the boiler-shop and see if he could get any work there; and he went to the shop, where he obtained the employment in the manner and with the result hereinbefore mentioned.

“Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself if he goes on with it”: Wood on Master and Servant, sec. 349.

This doctrine presupposes that the servant has sufficient discretion to appreciate the dangers incident to the work, and has no application to the case of young and inexperienced children.

In such a case, it is the duty of the master, not only to warn the child, but to instruct him as to the dangers of the employment and the means of avoiding them.

To a mere child, like the plaintiff in this case, dangers which would be patent to the adult of experience are, or may be, latent: *Coombs v. New Bedford C. Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Grizzle v. Frost*, 3 Fost. & F. 622; *Dowling v. Allen*, 74 Mo. 16; 41 Am. Rep. 298; *Railroad Co. v. Fort*, 17 Wall.

554; *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400; *Sullivan v. India Mfg. Co.*, 113 Mass. 398; *Hill v. Gust*, 55 Ind. 49.

These cases proceed upon the theory of the enhanced duty of the employer in cases of the employment of minors, without knowledge of the risks they are to assume.

This duty performed, the minor properly instructed, and he stands upon the same plane with other servants, in reference to the risks incident to the employment, and those arising from the want of care in his fellow-servants.

In the cases cited *supra*, no question was made as to the authority of the superintendent to bind his principal by ordering the thing done which produced the injury. In all of them, the service to be performed was within the scope of the authority conferred.

Here the question is, Could Snape bind the defendant by the order he gave the plaintiff to seek work outside of his own peculiar department?

He was a boss in the tool-room, and as such, we may fairly assume he was authorized to control and direct the manner in which the work of that room was to be performed, and all other things relating to the orderly and proper conduct of his branch of the business. But it does not appear that he was authorized to employ hands for any purpose.

Charles Hooper was the vice-principal of the defendant in the boiler-shop, with full control and authority, and authorized to employ and discharge help. He employed plaintiff, and directed him to obey David Snape; but he employed him to work in the tool-room, and the instructions given to plaintiff to obey the boss of that room must be construed in view of the employment.

We cannot, by any reasonable intendment, hold that the authority of David Snape was enlarged or extended by this direction of Hooper. It simply relegated the plaintiff to the control of Snape, within the purview and subject to the employment which Hooper had given him.

The employment to work in the tool-shop was the subject-matter, and the control given to Snape and the directions to plaintiff to obey him must be construed with reference to and confined to such subject-matter.

Plaintiff was directed to obey Snape, but it was as a laborer in the tool-room that he was so ordered.

We know of no rule or construction by which the order given under such circumstances, and for such a purpose, can

be held to authorize Snape to employ the plaintiff for an entirely different purpose from that contemplated by Hooper, and thereby to bind the defendant.

The roving commission given to the plaintiff by Snape, to seek employment in the boiler-shop, unless intended to direct him to the persons in charge of such shop, involved an element of carelessness, but it was not the negligence of the defendant or of its agent or vice-principal, its *aliter ego* authorized or held out as being authorized to speak for it.

We conclude, therefore, that as Snape was not authorized to send plaintiff to the boiler-shop in quest of employment, and that as he was not directed or employed by any one so authorized, the defendant is not responsible for the injuries which he received through the carelessness, if any, of defendant's employees.

It follows that the nonsuit was properly granted, and the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

THORNTON, J., dissented.

Rehearing denied.

INFANT EMPLOYEES. — Notwithstanding some general declarations to the contrary, which may occasionally be found in the reports, there is no question that the law recognizes some distinction between the duty which a master owes his adult servant or employee, and that which he owes to an employee who, from his youth or inexperience, or other mental immaturity or infirmity, is not able, without instruction, to understand the perils to which he is exposed in the course of his employment. This distinction, as near as we can express it, is this: that as to the latter class of servants, the master must give them full instructions with respect to the dangerous character of the machinery with or about which they are employed, and of the means necessary to be used to avoid those dangers: *Jones v. Florence M. Co.*, 66 Wis. 268; 57 Am. Rep. 269; *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28; *Douling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; *Coombs v. Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Grizzle v. Frost*, 3 Fost. & F. 622.

After they have received these instructions, they stand upon the same footing as other servants, and must suffer, without redress from their employers, injuries resulting either from their own negligence or that of their fellow-servants.

The only questions involved in the principal case, about which there can be any serious difference of opinion, are, whether the negligence of the person whom the plaintiff obeyed is to be regarded as the negligence of his fellow-servant, and whether the plaintiff should have been precluded from

recovery on the ground that the person whom he obeyed had no authority to direct him to enter upon the performance of the dangerous duty.

Now, it is conceded by all the cases that the master has a duty to perform with respect to instructing minor and inexperienced servants. If this duty may be avoided by merely placing them under the charge of an elder and more experienced person, and denouncing the failure of the person under whose charge they are thus placed to instruct them as the mere negligence of a fellow-servant, then nothing has been gained by the declaration of the general principle that it is the duty of the master to instruct such servants.

The true rule, we think, is this: that whenever the law imposes a duty upon the master it will not permit him to evade the performance of this duty by delegating it to another; and the act or neglect of that other is, with respect to a person injured by it, the act or negligence of the master. As was said by the court of appeals of New York, in the case of *Flike v. Boston and Albany R'y Co.*, 53 N. Y. 553, "the true rule is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed."

Dwelling v. Allen, 74 Mo. 13, 41 Am. Rep. 298, was, in its facts, very like the principal case. The plaintiff, being seventeen years of age, and without experience in the foundry business or with machinery, was employed by the defendant. At first his duties consisted in running errands and in sweeping out. Afterwards he was employed in a machine-shop, and in a yard where a turn-table was being constructed under the charge of King, one of his fellow-servants, whom he had been instructed to obey by the defendant's foreman. After plaintiff had been working about three weeks at the turn-table with King, the latter directed him to stop the engine. The engine could be reached in two ways, the shorter of which was to cross a revolving shaft. King directed the boy to hurry, and he therefore took the shorter way, and in stepping over the revolving shaft, he was caught by it, and suffered the injuries for which he sought compensation by the action. The court said: "We think the doctrine well settled by the authorities that, although the machinery, or that part complained of as especially dangerous, is visible, yet if by reason of the youth and inexperience of the servant he is not aware of the danger to which he is exposed in operating it or approaching near to it, it is the duty of the master to apprise him of the danger, if known to him."

The objection that the plaintiff was injured through the negligence of his fellow-servant was disposed of as follows: "Nor do we think that in this instance King, who gave the plaintiff the order to stop the engine, was the plaintiff's fellow-servant. While it appears that Fisher was foreman of the establishment, King had charge of the construction of the turn-table, and Fisher directed the plaintiff to go with King and do whatever he should direct. In *McGowan v. Railroad Co.*, 61 Mo. 528, 'there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery.' Here King was foreman of the hands constructing the turn-table. They were under him, and the plaintiff was expressly ordered by Fisher to do whatever King told him. A foreman of an entire establishment as extensive as defendant's cannot be everywhere present to direct the employees in their work; but must of necessity give

orders through others, as in this instance. In *Marshall v. Shricker*, 63 Mo. 309, relied upon by appellant, it was held that 'the employer cannot be charged with negligence of one who is merely a foreman over the plaintiff not engaged in a distinct department of the general service, but in some work with plaintiff, and not charged with any executive duties or control over plaintiff which would constitute him the agent of the employer.' Aside from the fact that King was foreman here, is the additional fact that Fisher directed plaintiff to do whatever King might order him to do; and he was in fact obeying Fisher in executing King's order. If it was negligence or recklessness to direct plaintiff to perform the work in the prosecution of which he received the injury, it was a direct consequence of the order given by Fisher, who was defendant's *alter ego*."

The decision in the principal case is placed partly upon the ground that the plaintiff was not justified in obeying David Snape, by the fact that defendant's vice-principal had placed him in Snape's charge, with instructions to yield him obedience.

Snape was the boss of the tool-room; and the court was of the opinion that the instruction given to plaintiff by the vice-principal must be interpreted in connection with Snape's apparent employment, that of boss of the tool-room, and as not requiring or justifying the plaintiff in obeying him in respect to matters not taking place in such room. This construction of the direction given the plaintiff by defendant's vice-principal may be correct as a legal principle, and yet perhaps not be entirely conclusive of plaintiff's right to recover. If minors and other inexperienced persons are entitled to be warned of the dangers of machinery in operation in their presence and visible to them, the same careful and merciful spirit ought to exempt them from the consequences of misinterpreting language well calculated to mislead them, and requiring for a correct determination of its effect careful judicial deliberation. Even in the case of an adult employee, he cannot be expected to enter into disputes with those placed in authority over him. This question was carefully considered, and we think directly determined in the case of *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

Williams was a young man in the employ of the plaintiff in the capacity of a common laborer, and Smith was in charge of a construction train. While Williams was on a flat-car, near the engine, assisting in unloading ties, Smith ordered him to go back to the caboose and help stop the train. He started back, and was not again seen until it was discovered that he had fallen between the cars and received injuries resulting in his death. In a suit brought by his administratrix to recover for such injuries, it was claimed that no recovery could be had, because Williams was not under the direction and control of Smith, nor subject to his orders. The court to this objection replied: "The fact that Williams was under no obligation to obey the order of Smith is not, in our opinion, sufficient to sustain the first proposition. When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself, for any failure to do so, to the double liability of being expelled from his employment and of being required to pay damages. It is true, the master had no right to direct him to do anything not contemplated in the employment; but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refuses to obey would take upon himself the burden of showing a lawful reason for the refusal. This of itself is sufficient for excusing the servant who

declines the responsibility in any case in which doubts can possibly exist; he should assume that the order is given in good faith, and in the belief that it is rightful; and if, in his own judgment, it is unwarranted, it is not for the master to insist that the servant was in the wrong in not refusing obedience. Respect for the master, as well as a consideration for his own interest, may very properly induce him to waive his own judgment for that of his superior, and instead of engaging in disputes and being perhaps ejected from his employment, to leave questions of doubt for future settlement. Now, although we think, on the facts, as the jury has found them, there was no authority to send Williams to handle brakes, yet the point was not so clear but that serious question was made of it on the trial; and it would be grossly unjust to compel the servant at his peril to decide correctly on the validity of an order presumptively lawful, when the consequences of even a correct decision might be apparent insubordination, and perhaps difficulty and litigation. It is perfectly just, under such circumstances, to leave upon the master the responsibility he assumed in giving the unwarranted order, and to hold that the servant is not blamable in yielding obedience to his superior. . . . Nor do we think it follows that, because Smith at the time was exceeding his authority, the company is not responsible for his action. It is in general no excuse to the employer that the injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risks of such disobedience when he puts the servant into his business, and the reasons for holding him responsible for the servant's conduct are the same, whether injury results from a failure to observe the master's directions, or from a neglect of the ordinary precautions for which specific directions are deemed necessary. It will be conceded that, for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible; this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an exercise of authority committed in furthering the master's interest, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these; and it is his duty to keep his servant, in what is done by him, within the fixed limits. An act in excess would still have the apparent sanction of his authority; the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction. In this case Smith had charge of the train and of the men employed with it. In what he did he was not purposely committing any wrong outside the employment; but his wrong was committed while acting in the very capacity in which he was employed, and had for its manifest purpose, not to injure Williams, but to advance the interests of the railway company. As between the company and any other than a fellow-servant, there could be no question that his act should be deemed the act of the company. But we also think that, where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business and are incident to it that the master is excused from responsibility; and a risk of this nature, not being one of the kind, the general rule applies, and he must answer for the misconduct of his agent."

WHO ARE FELLOW-SERVANTS. — A yard-laborer and a locomotive-engineer: *Chicago and Alton R. R. Co. v. Murphy*, 53 Ill. 336; 5 Am. Rep. 48. A rail-

way road-master and a laborer on a culvert: *Lawlor v. Androscoggon R. R. Co.*, 62 Me. 463; 16 Am. Rep. 492. A mill-hand and other employees bound to keep fire apparatus in order: *Jones v. Granite Mills*, 126 Mass. 84; 30 Am. Rep. 661. The master of a lighter and the crew: *Johnson v. Boston Tow-boat Co.*, 135 Mass. 209. Mechanics in a repair shop: *Murphy v. Boston and Albany R. R. Co.*, 88 N. Y. 146; 42 Am. Rep. 240. Road-master and section-hand: *Brown v. Winona and St. Peter R. R. Co.*, 27 Minn. 162; 38 Am. Rep. 285. A foreman having no power to discharge employees and an employee: *Peterson v. Whitebreast Coal and Mining Co.*, 50 Iowa, 673; 32 Am. Rep. 143; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; 42 Am. Rep. 543. Engineer and brakeman: *Nashville etc. v. Wheless*, 10 Lea, 741; 43 Am. Rep. 317. Brakeman and car-inspector: *Smith v. Flint etc. R'y Co.*, 46 Mich. 258; 41 Am. Rep. 161. Conductor and telegraph operator and fireman: *Slater v. Jewett*, 85 N. Y. 61; 39 Am. Rep. 67. Train-dispatcher and brakeman: *Robertson v. Terre Haute etc. R. R. Co.*, 78 Ind. 77; 41 Am. Rep. 552. Master and mate of a vessel: *Matthews v. Case*, 61 Wis. 491; 50 Am. Rep. 51. A baggage-master on a train and a switch-tender: *Roberts v. Chicago etc. R'y Co.*, 33 Minn. 218. Conductor and employee on a construction train and another employee: *Cassidy v. Maine Cent. R. R. Co.*, 76 Me. 488. Brakeman and conductor acting as engineer: *Rodman v. Michigan Cent. R. R. Co.*, 55 Mich. 57. Track-repairers and hand-car crew: *O'Brien v. Boston and Albany R. R. Co.*, 13 Mass. 387; 52 Am. Rep. 279. Engineer and coupler of a freight train: *Boatwright v. Railroad Co.*, 25 S. C. 128. Watchman and repairer under car on track: *Luebke v. Chicago, M., & S. P. R'y Co.*, 63 Wis. 91; 53 Am. Rep. 266. Railroad yard-master and a car-repairer: *Kirk v. Atlanta etc. R. R. Co.*, 94 N. C. 625. Saw-mill engineer and contractor's servant working on wheel: *Ewan v. Lippincott*, 47 N. J. L. 192; 54 Am. Rep. 148. Engine-wiper employed in round-house and trainmen: *Ewald v. Chicago & N. W. R'y Co.*, Wis. Sup. Ct., Jan. 1888. Foreman at railroad round-house and employee under him: *Gonsior v. Minneapolis & St. L. R'y Co.*, 36 Minn. 385. A member of a repairing gang and an engine-driver: *Bolback v. Railroad Co.*, 43 Mo. 187. A master-mechanic and locomotive-engineer: *Hard v. Railroad Co.*, 32 Vt. 473. Brakeman of one train and the engineer of another: *Wright v. Railroad Co.*, 25 N. Y. 562. Watchman at a street-crossing and a switch-tender: *Sammon v. Railroad Co.*, 62 Id. 251. An employee crossing the track on his way to work and the engine-driver who backs the engine upon him: *Keyes v. Railway Co.*, 3 Atl. Rep. 15 (Penn.). Car-repairer and a brakeman: *Railway Co. v. Foster*, 11 Am. & Eng. R. R. Cas. 180. Mechanic in repair shop and a brakeman: *Wonder v. Railway Co.*, 32 Md. 419. Section-hand and engine-driver: *Clifford v. Railway Co.*, 6 N. E. Rep. 751 (Mass.); *Foster v. Railway Co.*, 14 Minn. 360; *Collins v. Railway Co.*, 30 Id. 31; *Boldt v. Railroad Co.*, 58 N. Y. 432; *Blake v. Railroad Co.*, 70 Me. 60; 35 Am. Rep. 297. Trackman and baggage-man: *Moseley v. Chamberlain*, 18 Wis. 700. Section-man and brakeman: *Cooper v. Railway Co.*, 23 Id. 668. Shoveler on track and conductor: *Naylor v. Railway Co.*, 53 Id. 661; *Howland v. Railway Co.*, 54 Id. 226; *Heine v. Railway Co.*, 58 Id. 525. Brakemen and trainmen: *Whitwam v. Railway Co.*, 58 Id. 408. Track-walker and fireman: *Schultz v. Railway Co.*, 67 Id. 616; 58 Am. Rep. 881.

WHO ARE NOT FELLOW-SERVANTS. — The agent of a railroad company to hire men and a foreman hired by him: *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417. A deck-hand on steamboat A and the crew of steamboat B, the owners being partners: *Connolly v. Davidson*, 15 Minn.

519; 2 Am. Rep. 154. A laborer in a railroad carpenter-shop and a locomotive-engineer: *Ryan v. Chicago etc. R. R. Co.*, 60 Ill. 171; 14 Am. Rep. 32. A railway train-dispatcher and a fireman: *Fiske v. Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545. A carpenter having charge of repairs and a laborer in a brewery: *Malone v. Hathaway*, 64 N. Y. 5; 21 Am. Rep. 573. A superintendent with power to hire and discharge and an employee: *Brothers v. Carter*, 52 Mo. 373; 14 Am. Rep. 424; *Corcoran v. Holbrook*, 59 N. Y. 517; 17 Am. Rep. 369; *Mullan v. Philadelphia Steamship Co.*, 78 Pa. St. 25; 21 Am. Rep. 2; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 362; 44 Am. Rep. 573; *Mitchell v. Robinson*, 80 Ind. 281; 41 Am. Rep. 812; *Tyson v. N. & S. Ala. R. R. Co.*, 61 Ala. 554; 32 Am. Rep. 8; *Dowling v. Allen*, 84 Mo. 13; 41 Am. Rep. 298; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; 47 Am. Rep. 653; *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35. The conductor, engineer of a railway train, and a brakeman: *Cowles v. Richmond and Danville R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620. A superintendent of repairs and an engineer: *Fuller v. Jewett*, 80 N. Y. 46; 36 Am. Rep. 575. Road-master and bridge-builder and fireman: *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84; 45 Am. Rep. 590. A train-dispatcher and an engineer: *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Danigan v. New York etc. R. R. Co.*, 52 Conn. 285; 52 Am. Rep. 590. A track-repairer and a fireman: *Chicago etc. R. R. Co. v. Moranda*, 93 Ill. 302; 34 Am. Rep. 168. One who was engineer, superintendent, and conductor of a gravel train and a train-hand: *Dobbin v. Richmond and Danville R. R. Co.*, 81 N. C. 446; 31 Am. Rep. 512. Master mechanic, engineer, and fireman, and track-man: *Ohio etc. Ry Co. v. Collam*, 72 Ind. 261; 39 Am. Rep. 134. Foreman and car-repairer: *Luebke v. Chicago etc. Ry Co.*, 59 Wis. 127; 48 Am. Rep. 483. A section-foreman and a brakeman: *Lewis v. St. Louis etc. R. R. Co.*, 59 Mo. 495; 21 Am. Rep. 385. A superintendent and foreman and a conductor: *Patterson v. Pittsburgh etc. R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412. A conductor and a section-foreman and a brakeman: *Moon's Adm'r v. Richmond etc. R. R. Co.*, 78 Va. 745; 49 Am. Rep. 401. Conductor of a construction train and a laborer: *Chicago etc. Ry Co. v. Swanson*, 16 Neb. 254; 49 Am. Rep. 718. A car-inspector and a car-coupler: *Tierney v. Minneapolis etc. R. R. Co.*, 33 Minn. 11; 53 Am. Rep. 35. Locomotive-engineer and track-repairer: *Calvo v. Charlotte etc. R. R. Co.*, 23 S. C. 526; 55 Am. Rep. 28. Laborer for contractor in building a railroad and locomotive-engineer in employ and under control of the railroad company: *Louisville etc. R. R. Co. v. Conroy*, 63 Miss. 562; 56 Am. Rep. 525. A railway section-foreman and locomotive-engineer: *St. Louis etc. Ry Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176. Locomotive-engineer and conductor and telegraph operator: *Madden's Adm'r v. Chesapeake and Ohio Ry Co.*, 28 W. Va. 610; 57 Am. Rep. 695. Stevedore's foreman and his laborers: *Brown v. Sennett*, 68 Cal. 225; 58 Am. Rep. 8. Locomotive boiler-repairers and engineer and fireman: *Pennsylvania etc. Canal & R. R. Co. v. Mason*, 109 Pa. St. 296; 58 Am. Rep. 722. Conductor of material train and laborer: *Coleman v. Wilmington etc. R. R. Co.*, 25 S. C. 446; 60 Am. Rep. 516. Train-dispatcher and train-men: *Lewis v. Siefert*, Penn. Sup. Ct., Oct. 3, 1887; 37 Alb. L. J. 162; *Smith v. Wabash etc. Ry Co.*, 92 Mo. 359.

[IN BANK.]

ANDERSON v. GOFF.

[72 CALIFORNIA, 65.]

MISTAKE IN NOTICE OF APPEAL, whereby the judgment appealed from is described as entered on the day when the judgment was rendered, instead of the day on which it was entered, does not entitle the respondent to a dismissal of the appeal.

JUDGMENT AGAINST INSOLVENT ENTERED AFTER GRANTING OF DISCHARGE is conclusive against him, if regularly obtained.

AFFIDAVIT FOR SERVICE OF SUMMONS is sufficient when it shows a cause of action against the defendant, and that he is a resident at a place in another state, which place and state are named in such affidavit. In such circumstances it is not necessary to show an attempt to find the defendant in the county or state where the action is pending; nor is it necessary to show that an attachment has issued against his property.

AFTER ATTACHMENT OF PROPERTY, NO ORDER OF SALE is necessary to authorize the sale thereof, the lien of the attachment continues after taking a simple money judgment, without embodying therein any directions for the sale of the attached property.

PERSONAL JUDGMENT AGAINST NON-RESIDENT whose property has been attached within the state is valid, and sufficient to sustain a sale of such property made under such judgment, though the service of summons was by publication.

ORDER FOR PUBLICATION OF SUMMONS directing a deposit of a copy of the summons in the post-office, but omitting the word "forthwith" in such direction, is not void because of such omission, and will sustain a service, where such deposit was in fact made on the same day the order was signed.

FORTHWITH, WHEN APPLIED TO PERFORMANCE OF ACT, signifies as soon as, by reasonable exertion, it may be performed. It also sometimes means within a reasonable time, or with all reasonable dispatch; and when a defendant is directed to plead forthwith, he must plead within twenty-four hours.

CONTINUANCE OF PUBLICATION OF SUMMONS beyond the time required by the order of the court does not extend the time in which defendant is required to answer.

ATTORNEY OF PLAINTIFF MAY DEPOSIT COPY OF SUMMONS and complaint in post-office, and his affidavit that he did so is competent evidence.

RETURN ON ATTACHMENT IS SUFFICIENT as against a collateral attack, when it states that the officer "duly levied upon all the right, title, and interest of the defendant in and to the following real property, to wit" (describing the land in controversy).

EJECTMENT. Both parties claim title under one Anderson. The plaintiff recovered judgment in the superior court. Defendant appealed. A motion was made to dismiss the appeal, on the ground that it designated the judgment appealed from as having been entered March 29, 1884, while the record shows the judgment to have been entered April 30, 1884. The other facts are stated in the opinion.

G. B. Montgomery, and Burchard and Scott, for the appellant.

Briggs and Hawkins, and McCroskey and Hudner, for the respondent.

By Court, SEARLS, C. The motion to dismiss the appeal herein is met by a certificate of the clerk of the superior court in and for the county of San Benito, in which county the action was brought and passed to judgment, showing that the statement on motion for new trial was properly settled and certified by the judge of the superior court; that the order overruling the motion for a new trial was entered and signed by the judge on May 31, 1884, and that the judgment in said cause was rendered on the twenty-ninth day of March, 1884, and entered on the thirtieth day of April, 1884, before the notice of appeal was filed.

The motion to dismiss the appeal should be denied.

The appeal is taken by plaintiff from a judgment in favor of defendant, and from an order denying a new trial. The action is ejectment to recover a lot of land containing one and one half (1½) acres situate in what is known as College addition to the town of Hollister, San Benito County, and to recover damages for the withholding such land, and rents and profits.

Plaintiff, at the several dates hereinafter mentioned, was and still is a married woman, the wife of J. G. Anderson.

On the tenth day of November, 1876, one W. C. Land, being the owner of and in possession of the premises described in the complaint, conveyed the same to plaintiff's husband, and took from the latter his promissory note for six hundred dollars, the purchase price thereof.

On the tenth day of November, 1878, Anderson gave Land a new note for three hundred dollars, the residue of the purchase price of the land having been previously paid.

On the 26th of April, 1880, according to the findings, Anderson, being insolvent, and unable to pay his debts, being indebted to various persons in sums aggregating over four thousand dollars, and among others to Land, on account of said note, in the sum of over three hundred dollars, in contemplation of insolvency, and for the purpose of hindering, delaying, and defrauding his said creditors, among whom was said Land, conveyed without consideration, and as a gift, the land in question to his wife, the plaintiff herein. Plaintiff never went into possession of the land, and knew of the in-

solvency of her husband. The deed was recorded April 28, 1880.

On May 6, 1880, Anderson filed his petition and schedule in insolvency in Alameda County, to which he had removed, and such proceedings were had therein, that he was adjudged an insolvent debtor, and afterward, on the fourth day of August, 1880, was discharged from his debts. He removed soon thereafter to Colorado, where with plaintiff he still resides.

On February 16, 1881, Land brought suit against Anderson on his note, sued out a writ of attachment, and caused the same to be levied upon the interest of the defendant therein in and to the demanded premises. Service of summons was had upon Anderson by publication, etc., and upon his default for want of an answer judgment was taken in favor of plaintiff, upon which an execution issued, was levied upon the property attached, and, after notice, a sale was had, at which Land became the purchaser, and in due time, there having been no redemption, received a sheriff's deed of the premises.

Defendant holds the property by sundry mesne conveyances from Land, and has been in possession under his deed since August, 1882.

We may dismiss from consideration the proceedings of Anderson in insolvency, for the reason that if the judgment of Land was regularly obtained, the former is concluded thereby for want of a plea of his discharge in that action.

Several objections are made by appellant to the affidavit for publication of summons, among which are,—1. That it fails to state that any writ of attachment was issued or levied, or that the defendant therein had any property in this state; 2. That it failed to show any attempt at service in this state, or any return of an officer that defendant could not be found, etc.

Our Code of Civil Procedure, sections 412 and 413, provides that when the person on whom service is to be made resides out of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, etc., and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a necessary or proper party to the action,—an order of service by publication of summons may be made, etc.

The affidavit in this case showed that the plaintiff had a

cause of action against the defendant therein, and also referred to his complaint containing a like showing, and duly verified. He also showed by the affidavit that defendant was a resident of Denver, in the state of Colorado, and was there engaged in business, etc.

The affidavit was sufficient to warrant an order of service of the summons by publication.

Where a defendant is shown to be a resident of another state, and his place of residence is known, it is not necessary to show diligence in finding him in the county or state where the action is pending, or to have the return of an officer showing that he cannot be found. Nor was it necessary to show by the affidavit that a writ of attachment had issued, or that the defendant had property in this state.

Our statute gives the right to service of summons upon defendants in all cases where they are non-residents of the state, without reference to the fact of their having or not having property here. The effect of a judgment thus obtained is quite another thing.

In *Pennoyer v. Neff*, 95 U. S. 714, it was held by the supreme court of the United States that although a state having property of a non-resident within her territory may hold and appropriate it to satisfy the claim of her citizens against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property, yet in the absence of such seizure, a personal judgment is without validity if it be rendered by a state court in an action upon a money demand against a non-resident, who was served by publication of summons, but upon whom no personal service of process within the state was made, and who did not appear.

The same doctrine was laid down substantially in *Belcher v. Chambers*, 53 Cal. 636, in which it was held that, although a state having property of a non-resident within her territory may hold and appropriate it to satisfy the claim of her citizen against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property, yet in the absence of a seizure of such property, a personal judgment is without validity, if it be rendered by a state court in an action upon a money demand against a non-resident who was served with summons by publication only, and who did not appear in the action, and the personal judgment was held void.

The right to institute and prosecute an action against a non-resident, and to serve summons upon him by publication, is by these cases upheld, so far as may be necessary to determine his liability, with a view of subjecting his property to the payment of a debt due to a resident; provided always, that such action must be in aid of an attachment, or some other process designed to reach and establish a lien upon the debtor's property within the local jurisdiction.

Now, in this state we have one specific mode by which to acquire a lien upon the property of a debtor against whom a cause of action exists arising out of contract. It consists in commencing an action, and praying for judgment as in other cases; and upon filing a proper affidavit and undertaking, a writ of attachment issues, under which the property of the alleged debtor may be seized and held subject to sale for the purpose of satisfying such judgment as may be recovered. The judgment, when rendered, does not differ from that entered in other cases upon a money demand.

"If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant," etc.: Code Civ. Proc., sec. 550.

By force of section 688 of the same code, "all property and rights of property seized and held under attachment in the action are liable to execution."

Under these provisions it has been held by this court that no order of sale by the court is necessary to authorize the sheriff to sell the attached property, and that the lien of the attachment is not lost by taking a simple money judgment, without embodying therein directions for the sale of the attached property: *Low v. Henry*, 9 Cal. 538.

In *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256, it was held that "when a judgment is rendered in an attachment suit, and becomes a lien on real property attached, the lien of the attachment is merged in the judgment"; and in *Porter v. Pico*, 55 Id. 174, it is said: "But the judgment does not operate so as to release or obliterate the attachment lien. The property attached is still in contemplation of law in the hands of the officer, subject to the judgment. The attachment lien still exists so as to confer a priority in the lien of the judgment. . . . The property is sold under the final process issued on the judgment."

Had our courts adopted the practice in cases where attach-

ments are issued, of declaring the lien of the attachment in the judgment, and directing the attached property to be sold in satisfaction of such lien, the orderly connection between the lien and the rights accruing to a purchaser under a sale thereunder would be more readily apparent, but in the light of the interpretation given to the statutes, and to the judgments in such cases, the same result is reached.

In view of this result, we think it must follow that while a personal judgment against a non-resident debtor who is only served with process by publication is void and of no effect, yet in a case where the debtor has property within the state, which is seized under a writ of attachment issued in the cause at the time the suit is brought, a judgment therein, which, though general in its terms, has the effect of perpetuating the attachment lien, and of subjecting the attached property to the payment of a debt due from the non-resident, is so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and considered for that purpose and to that extent is not void.

It is the method, and only method, pursued in our courts for subjecting the property of a non-resident debtor to the payment of demands due from him to our citizens, and the object sought is the essential thing to be considered, and is of more importance than the means by which the end is attained.

The facts that defendant had property in this state, that a writ of attachment issued in the cause was levied thereon, and the property sold in satisfaction of the claim, are all in proof.

The existence of these facts are essential to the validity of the proceedings.

The requirements of the affidavit for publication of summons are to be measured by our code, and the facts that defendant has property in this state, and that a writ of attachment has issued, are not among them.

The decisions quoted from the New York courts have no application here, for the reason that the statute of that state is essentially different from our own. There service of summons can only be had against a non-resident of the state who "has property therein," etc.: New York Code, sec. 135.

Under such a statute, the ownership of property in the state becomes a jurisdictional fact necessary to be stated in the affidavit.

The order of service of summons by publication, after stat-

ing the jurisdictional facts, and ordering publication in a designated paper for two months, directed a copy, etc., to be deposited in the post-office, etc., directed to defendant, etc., but failed to include in such direction the word "forthwith," as contained in section 413, Code of Civil Procedure.

"The court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence."

The term "forthwith," when applied to the performance of an act, imports that it shall be performed as soon as by reasonable exertion confined to that object it might be; and which must consequently vary according to the circumstances of each particular case: 3 Chitty's General Practice, 112.

In *Roberts v. Brett*, 36 Eng. L. & Eq. 358, it was held to mean "within a reasonable time."

When a defendant is ordered to plead forthwith, he must plead within twenty-four hours: Wharton's Law Dictionary. In other matters of practice, the word has come to have the same meaning: 2 Edw. Ch. 328; *Moffatt v. Dickson*, 3 Col. 313; Bouvier's Law Dictionary.

Like the term "immediately," it is not in law to be necessarily construed as a time immediately succeeding without an interval, but an effectual and lawful time, allowing all the "adjuncts and accomplements" necessary to give an act full legal effect to be performed.

In *Van Wyck v. Hardy*, 20 How. Pr. 222, 11 Abb. Pr. 473, the word "forthwith" was construed as synonymous with "all reasonable dispatch."

The deposit of a copy in the post-office was made on the day the order was signed, and we are of opinion that the omission of the word "forthwith" from the order requiring such deposit was at most an irregularity which did not render the proceedings void, but which might perhaps have been good cause to set aside the proceedings for irregularity on a direct motion for that purpose.

The default was not prematurely taken. The summons was published from February 19, 1881, for two months, which expired April 20th. The defendant then had thirty days in which to answer, which expired May 21, 1881, and the default was not entered until May 27th following. The fact that the newspaper continued to publish the summons until May 7th did not have the effect to extend the time to answer beyond the periods fixed by the order of publication and the statute.

The deposit of a copy of summons and complaint, prepaid, in the post-office by N. C. Briggs, the attorney of plaintiff, and his affidavit of that fact, was sufficient.

The provisions of section 410, in relation to service of summons upon a defendant personally, have no application to the deposit of a copy in the post-office, the affidavit of performance of which act is provided for by the third subdivision of section 415.

We think the judgment roll in *Land v. Anderson* was good as against a collateral attack, and was properly admitted in evidence: *McCauley v. Fulton*, 44 Cal. 355.

The objection made to the manner of levying the attachment is not tenable.

The court finds that it was duly levied upon the land in question, and the finding is supported by the return of the officer, in which he certifies that he "duly levied upon all the right, title, and interest of the said J. G. Anderson in and to the following real property, to wit" (describing the land in dispute).

Under the ruling of the court in *Porter v. Pico*, *supra*, this was sufficient as against a collateral attack.

Like considerations apply to the objection urged to the return on execution.

These views render the other questions raised in the record unimportant.

We are of opinion the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

JUDGMENT AGAINST NON-RESIDENTS. — After the decision in *Pennoy v. Neff*, 95 U. S. 714, some apprehension was felt that there might be no mode of subjecting the property of non-resident debtors, situate in this state, to the claims of their creditors. The only proceeding which the statute of the state had contemplated as the basis of its jurisdiction over the persons of defendants was the issue and service of summons. But this service, when made beyond the state, upon one not then a citizen thereof, was of itself clearly insufficient to bring him within the jurisdiction of the court. The principal case, however, declares that proceedings under attachment, though they do not result in any taking of the property into the possession of the court, nevertheless bring it within the jurisdiction, so as to bind it by a personal judgment subsequently entered in the action and based upon the constructive service of process on a non-resident.

KRUGER v. WESTERN FIRE AND MARINE INSURANCE COMPANY.

[72 CALIFORNIA, 91.]

GENERAL AGENT OF FIRE INSURANCE COMPANY may waive a condition inserted in the policy issued by the company. Condition in policy of insurance is waived by the issuing of such policy by a general agent, who at that time knows of and assents to facts which constitute a breach of such condition.

WAIVER OF BREACH OF CONDITION AT ISSUANCE OF POLICY of insurance continues in favor of all renewals granted of such policy.

S. C. Van Ness, for the appellant.

D. M. Delmas and George Lezinsky, for the respondents.

By Court, FOOTE, C. This was an action to recover upon two policies of insurance. The cause was tried before a jury, who brought in a verdict in favor of the plaintiffs, upon which a judgment was rendered against the defendant for fifteen hundred dollars, costs, etc. From that judgment an appeal is prosecuted.

From that record it appears that in the year 1881 Grant Lapham, the agent of the defendant in the county of Alameda, where the plaintiffs kept their stock of goods, was at the place of business of the plaintiffs, and examined said stock, and that on the thirty-first day of August, 1881, after such examination, the defendant issued a policy of insurance upon the stock of goods thus examined by its agent.

The testimony of one of the plaintiffs with reference to the transaction was as follows:—

“Yes, sir; I did have a conversation with him,”—meaning Lapham.

“First, you know, we insured with another man. The agent came round and insured us. That was right before the Fourth of July. He did not bring around the policy; he kept the policy. During the Fourth we did not have any policy at all. Right after the Fourth he brought it around. I said: ‘You just bring it around now. There is no danger now.’ That was before ‘the danger is over now,’ I says. ‘You can keep it now.’ He left it in the store; left it there over a week. I told him I would not accept it. Then during the week I read over the policy what he left there. It mentioned something about the coal-oil. During that time Mr. Grant Lapham came around and said he wanted to insure us. I told him about this. He *was a friend of mine*. I told him about this that was in the

policy. 'What is the use of insuring? We cannot get nothing if we burn out. Because it says there mentions about the coal-oil.' 'He says such a small amount as you keep, that won't be any matter. You don't keep any large amount.' I told him all right; go on and insure us. Then he brought around the policy; so it was all right. We kept it."

It was further proved that upon the expiration of the policy thus issued in August, 1881, and at the expiration of each year thereafter, down to and including the issuance of the policies in suit, new policies in the same company upon the same description of goods were issued by defendant to plaintiffs.

No further conversations with any agent of the defendant were proved, nor were any other policies than those in suit introduced on the trial.

It appeared in evidence that there was an indorsement on said policies as follows:—

"Not valid until countersigned by the regularly authorized agent at Oakland, Alameda County, Cal. Countersigned Oakland.
GRANT LAPHAM."

The record further shows that during all the times that the policies sued on were in force, and at the time of the fire and loss in the complaint alleged, the plaintiffs kept, stored, used, and sold upon the premises in which the property described in the policies was during such time kept, the products of petroleum, consisting of illuminating oils; that the said oils were kept in a ten-gallon tank, into which they were poured at the top, and from which, when required by customers, they were drawn through a faucet; that the premises were lighted with said oils in lamps; and that the fire alleged in the complaint was directly caused by the fall of one of the said lamps; that the tank in which said oils were kept was the same tank that had been used by the plaintiffs on said premises during all the times they had carried on business on said premises, and that it had during all of said times stood directly opposite within a few feet of the entrance to said premises, and in full view of every one who entered the same; that no other oils were kept by the plaintiffs on said premises, except those kept in said tank, and plaintiffs also used said tank for the purpose of filling the lamps used for lighting said premises.

The policies of insurance contained, among others, this clause:—

"C. This company shall not be liable for loss occurring while any of the following-named articles are kept, stored, or

used in or on the premises herein described, any custom or usage of trade or manufacture to the contrary notwithstanding, namely: petroleum and its products.'

It will be seen that the plaintiffs, having kept petroleum and its products on the premises in question, although in small quantity, could not recover on the policies, unless it should appear that the condition of the policy upon that subject had been waived by the company.

The acts and language of Lapham as above stated are not contradicted, nor is it disputed that he was the regularly constituted agent of the company resident at Oakland when the first policy of insurance was issued.

The policies sued on were unquestionably but renewals of that policy, and we think that an agent, so appointed and authorized as he was, was empowered to waive the condition of the policy, and we are of opinion that the plaintiffs were warranted, from what he said and did, in believing, and did believe, that such condition was waived. Lapham was the general agent of the company at Oakland, and authorized to represent it, make contracts of insurance, and transact its business at that place according to the practice and course of dealing of such corporations. He was authorized to make and did make the original contract of insurance; and the policies in suit, being but renewals of that, are to be affected by his acts as if they were the original contract: *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479, and cases cited.

The agent of the defendant authorized to act for them, and by whose acts they were bound, knew when he countersigned, and delivered the policy that it was absolutely void, unless he had waived the condition of the policy, by means of the alleged existence of which the company now seeks to avoid the payment of the loss; that is to say, the agent and the company took the premium, and yet believed the policy was void. And the company now says: "At the time we took your premium your policy was void, although our agent told you it was not, and induced you so to believe; yet you cannot recover of us the loss you claim, and you cannot be heard to state in evidence what our agent said, as that would be to vary the terms of a written contract by parol testimony." This, we think, the company is estopped from doing: *Woodruff v. Imperial Fire Ins. Co. etc.*, 83 N. Y. 140, and cases cited.

The delivery of the contract and a breach of its condition were concurrent acts, if the defendant's theory of the case be

correct; and at the moment the contract was entered into, it was void, although the party effecting the policy on his goods paid then and there the premium, and was made by the agent to believe that the policy was valid, and the petroleum-oil clause waived. The defendant's contention is without force. In the language of a distinguished judge, "we would scarce expect two parties to go through so senseless an act" as is claimed to have been done by the defendant, "if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding": *Van Schoich v. Niagara Fire Ins. Co.*, 68 N. Y. 436.

We are of opinion that the evidence objected to was properly allowed to go to the jury; that their verdict was in accordance with the facts in evidence, and the charge of the court, which last was not erroneous; that no prejudicial error is shown by the record; and that the judgment should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

Hearing in bank denied.

INSURANCE — WAIVER OF CONDITIONS — WHAT AGENTS HAVE AUTHORITY TO MAKE: *Combs v. Hannibal Sav. Co.*, 43 Mo. 148; 97 Am. Dec. 383; *Sheldon v. Atlantic F. & M. Ins. Co.*, 84 Id. 213, and note; *Keeler v. Niagara F. Ins. Co.*, 84 Id. 714; *Viele v. Germania Ins. Co.*, 96 Id. 83; *Pino v. Merchants' Mutual Ins. Co.*, 92 Id. 529; *Murphy v. South. L. I. Co.*, 27 Am. Rep. 761; *Stolle v. Etta F. & M. I. Co.*, 27 Id. 593, and note.

PIERCE v. GERMAN SAVINGS AND LOAN SOCIETY.

[72 CALIFORNIA, 180.]

NUISANCE. — Purchaser of reversionary interest in real estate upon which a nuisance exists, and of which he has full knowledge, and who thereafter receives the rents thereof from the tenant in possession, is answerable for damages arising from such nuisance subsequent to his purchase.

Jarboe, Harrison, and Goodfellow, for the appellant.

E. F. Swortfiguer, George A. Wentworth, and Lloyd Baldwin, for the respondent.

By Court, SEARLS, C. This action is brought to recover damages claimed to have been sustained from a nuisance maintained upon the premises of the defendant adjoining those of the plaintiff.

The cause was tried by a jury, and a verdict rendered in favor of the plaintiff for \$1,050, for which sum judgment was entered. Defendant appeals from the judgment, and from an order denying a new trial.

The facts shown by the evidence are, that the plaintiff and the defendant are the owners of contiguous lots of land on Montgomery Street in San Francisco, separated by a party-wall; that the plaintiff has been the owner of his lot of land for upward of twenty years, and that the defendant has been the owner of the adjacent lot of land since August 3, 1882; that upon the premises of the defendant there has been maintained a steam-bathing establishment for ten or twelve years; and that by the manner in which the said bathing establishment had been maintained, the plaintiff had sustained damage.

It also appeared that the said steam-bathing establishment was placed there by the former owner of the premises, and during the period of the alleged nuisance and damage was maintained by one Justin Gates, who was in possession under a lease from August Alers, the owner of the said premises at the time of making said lease.

Gates had been in possession of the premises, and had maintained the steam-bathing establishment, since January 1, 1880. He had taken a new lease from Alers, January 11, 1882, for the term of two years, and had remained in possession under that lease until after the commencement of this action.

While Gates was so in possession of the premises under this lease, Alers, on the 3d of August, 1882, conveyed the premises to the defendant, and after that date Gates attorned to the defendant, and paid it the rent provided for in the lease. In the summer of 1883 the premises were repaired by the defendant, and since then no damage has been sustained.

It would seem that the injury complained of commenced as early as 1881, and in January or February of 1882 plaintiff notified August Alers of the fact; that Alers then claimed to have nothing to do with the property, and referred plaintiff to the defendant as the owner. Defendant held a mortgage upon the property, but did not become the owner thereof until August 3, 1882, as before stated.

Prior to and at the time of becoming the owner of the property, defendant had full notice of the existence of the alleged nuisance.

Section 3483 of the Civil Code provides that "every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it."

Addison, in his work on torts, states the rule as applicable to the facts of this case thus: —

"If a nuisance be created on the premises, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion with the existing nuisance he makes himself liable for the continuance of the nuisance."

The doctrine thus enunciated is taken from the opinion of Littledale, J., in *Rex v. Peddy*, 1 Ad. & E. 827, and the learned judge proceeds to say: "But if, after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord desired to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it."

This limitation of the liability of the landlord, in cases where he has no right of entry to abate a nuisance created by the tenant after the demise, comports with justice. On the other hand, the landlord who demises premises with a nuisance existing thereon is a consenting party thereto.

In the present case, the former owner of the premises created the nuisance, and demised the same with such nuisance upon them to Dr. Gates.

Thereafter defendant, with full knowledge of the nuisance and of the tenancy, purchased the reversion, and received the rent from the tenant, who attorned to it, and during this state of things plaintiff sustained the damage for which he had verdict and judgment.

He who, with full knowledge of the existence of a nuisance upon real estate, for which the owner would be liable, purchases the reversionary interest in such real estate, and receives the rents thereof from the tenant in possession,

thereby voluntarily assumes the responsibility of such nuisance, and becomes liable for the damages sustained in consequence thereof, subsequent to his purchase.

The instructions of the court below were in consonance with this theory, and the judgment and order appealed from should be affirmed

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in bank denied

NUISANCE. — Liability of lessor of premises is considered in note to *City of Lowell v. Spaulding*, 50 Am. Dec. 776-783; see also *Kalis v. Shattuck*, 58 Am. Rep. 568.

PURCHASER OF PROPERTY, WHEN ANSWERABLE FOR CONTINUANCE OF PRE-EXISTING NUISANCE: *Crommelin v. Cox*, 68 Am. Dec. 121; *Pillsbury v. Moore*, 69 Id. 91; *Johanson v. Lewis*, 33 Id. 405, and note; *Pierson v. Glean*, 25 Id. 497; see also note to *Plumer v. Harper*, 14 Id. 338-341.

LIABILITY OF ERUTOR OF NUISANCE, CONTINUANCE OF, AFTER HE CONVEYS PROPERTY ON WHICH IT IS LOCATED: *Plumer v. Harper*, 14 Am. Dec. 333, and note.

DORE v. DOUGHERTY.

[72 CALIFORNIA, 232.]

JUDGMENT BASED ON ALIAS SUMMONS issued without any return of the original, and which imperfectly states the nature of the cause of action and fails to notify the defendant to appear and answer at the office of the justice, is not void.

JUDGMENT IS NOT SUBJECT TO LEVY AND SALE UNDER EXECUTION.

JUDGMENT DEBTOR MAY BE GARNISHED by delivering to him a copy of the writ of execution, with a notice in writing stating that all his right, title, and interest in such judgment, and all moneys, goods, credits, and effects due or owing by him to the judgment creditor are levied upon.

APPEAL WILL NOT BE DISMISSED because statement on motion for a new trial was not served on certain parties to the action not interested in the appeal.

ACTION to determine who is entitled to receive certain moneys, being the amount of a judgment and costs. One of the defendants, Miller, had attempted to obtain title to the judgment under proceedings taken by him under a judgment in his favor against George Dougherty, the judgment creditor. Miller's judgment was objected to because rendered by default in a justice's court, and based upon the service of an

alias summons, which was defective in the matters pointed out in the first subdivision of the *syllabus*. The other facts are stated in the opinion.

J. M. and Charles E. Nougues, for the appellant.

J. C. Bates, for the respondent.

By Court, TEMPLE, J. August 3, 1880, George Dougherty, one of the defendants, recovered judgment against the present plaintiff for \$2,186, and costs. On the same day Dougherty assigned the judgment to his son, John Dougherty. September 3d, Dore appealed to the supreme court from the judgment. The judgment was affirmed here February 16, 1883: *Dougherty v. Dore*, 63 Cal. 170. September 4, 1880, while the appeal was pending, defendant Miller caused a levy to be made on the judgment by virtue of an execution from the justice's court of San Francisco, upon a judgment against George Dougherty in favor of Miller. The attempted levy was by the sheriff, who delivered to and left with Maurice Dore a copy of the writ, with a notice in writing that such property, to wit,—“all the right, title, and interest in and to a certain judgment obtained in the superior court, department 5, of the city and county of San Francisco, in which George Dougherty is plaintiff, and Maurice Dore defendant, judgment having been rendered on the ninth day of August, 1880, against said Maurice Dore for the sum of \$2,186, and costs”; also notifying Dore that he levied upon all moneys, goods, credits, effects, debts due or owing, or in his possession, or under his control; and requesting him not to pay or transfer the same to any one save said officer. September 27, 1880, the sheriff proceeded to sell all the right, title, and interest of George Dougherty in the judgment to the defendant Miller for the sum of twenty dollars, which was credited upon the execution and judgment in favor of Miller against said Dougherty. This action was brought by Dore under section 386, Code of Civil Procedure, to have the court determine who was entitled to receive the money, the amount of the judgment and costs, \$2,850, being deposited in court. The court awarded the money to John Dougherty, the assignee of George Dougherty, and Miller appeals from the judgment, or a portion of it.

The superior court refused to allow Miller to introduce proof for the purpose of showing that the assignment to John Dougherty was fraudulent, on the ground that Miller had acquired

no title to the judgment against Dore, and had no such standing as would enable him to attack the assignment. This position is sought to be maintained on the ground, first, the judgment rendered in justice's court is void; but in this we do not agree with respondent's counsel. The summons was sufficient, at least as against a collateral attack, under the rule laid down in *Keybers v. McComber*, 67 Cal. 395. Whether the *alias* summons was regularly issued or not is not a jurisdictional question.

In the next place, it is claimed that the judgment was not subject to levy and sale under execution. We think this point well taken. It was expressly so held in *McBride v. Fallon*, 65 Cal. 301. Much may be said on both sides of this question, and it has been differently decided in different states. As it has been decided in the above case, we see no reason for reopening the discussion. It is claimed that the case of *McBride v. Fallon*, *supra*, only holds that the sale could not be made as it was attempted in that case, and that the mode of levy there was different from the mode pursued here. But that ruling is expressly placed upon the ground that the judgment is but the evidence of a debt, and the statute has made no provision for attaching or levying upon evidences of debt; but that it is the debt itself, and not the evidence of it, which may be levied upon by the writ of attachment, or on execution in like manner as upon writs of attachment. And to confirm this view, the court alludes to the case of *Davis v. Mitchell*, 34 Cal. 81, where it was held that a promissory note was the subject of levy and sale, when the sheriff could get possession of it, and could deliver it to the purchaser, and say they could not assent to the doctrine of that case. Of course it is not denied that a judgment is property, or that it can be the subject of assignment. The ruling is based entirely upon the statute. And it seems to us that it necessarily follows that the debt was by the proceeding duly levied upon. Service of the writ and notice constituted what is usually called the process of garnishment.

It is claimed that the garnishment is not sufficiently pleaded by defendant Miller. It is true, Miller claims to have bought the judgment; but in showing his title to the judgment he adopts by express reference the allegations in the complaint which show the garnishment, and adds the other facts which show the debt itself was duly levied upon. This put Miller in the attitude of a creditor, and gave him the right to attack

the assignment for fraud, and the ruling denying him that right was error. The other defendants were not interested in this appeal, and the motion to dismiss, on the ground that it does not appear that the statement was served on all the adverse parties, must be denied.

Judgment reversed, so far as the same affects defendant Miller, and a new trial ordered as to the claim of said defendant.

PATERSON and MCKINSTRY, JJ., concurred.

Hearing in bank denied.

DEFECTS IN SUMMONS, OR IN ITS SERVICE, must generally be urged by motion or proceeding for the vacation of the writ, or of its service. Otherwise, the irregularity is waived, and can aid the defendant in any attempt to collaterally avoid a judgment based upon such writ: *Freeman on Judgments*, sec. 126; *Keybers v. McComber*, 67 Cal. 395; *Ballinger v. Tarbell*, 85 Am. Dec. 527, and cases cited in note.

JUDGMENT, WHETHER SUBJECT TO LEVY AND SALE UNDER EXECUTION: *Osborn v. Cloud*, 92 Am. Dec. 413, and note 416.

JUDGMENT ENTERED BEFORE EXPIRATION OF TIME ALLOWED DEFENDANT to answer was held void in *Johnson v. Baker*, 87 Am. Dec. 293; *Ledford v. Weber*, 7 Ill. App. 91.

SULLIVAN v. ROYER.

[72 CALIFORNIA, 248.]

JURY TRIAL. — Counsel have no right to read law books, nor to argue questions of law to the jury.

ABATEMENT OF NUISANCE is accomplished in equity by an injunction, adapted to the facts of the case.

PRAYER OF COMPLAINT for the abatement of a nuisance warrants a decree for an injunction against the continuance of such nuisance.

VERDICT OF JURY IN SUIT IN EQUITY is advisory merely.

NUISANCE. — The issuing of soot from a smoke-stack may be enjoined, where it constitutes a disagreeable nuisance in a populous city.

LICENSE TO MAINTAIN NUISANCE, if granted by a board of supervisors, will not be permitted to substantially impair the rights of property holders.

SUIT in equity to abate a nuisance, consisting of soot issuing from a smoke-stack on the premises of the defendant in the city of San Francisco. Decree for the plaintiff.

M. A. Wheaton, for the appellant.

Preston and Allen, and J. M. Allen, for the respondent.

By Court, FOOTE, C. This is an action in equity, instituted for the purpose of enjoining and abating certain nuisances,

and for the recovery of damages resulting therefrom. The cause was tried before a jury, who heard all the evidence given therein, a verdict was by them rendered for one hundred dollars damages against the defendant, "and that he be ordered by the court to abate the nuisances complained of by the plaintiff." Thereupon the court made and filed written findings of fact upon all the material issues raised by the pleadings, and rendered its judgment, enjoining the defendant from continuing the nuisances complained of, ordering that the same be abated, and that the plaintiff recover the sum of one hundred dollars damages, and costs. A new trial was moved for by the defendant, and denied, and from the judgment and order made therein this appeal is prosecuted.

Counsel for the defendant contends most earnestly, upon several grounds, that the judgment and order should be reversed, but none of them appear to us to be tenable.

There was no error in the refusal of the court to allow the defendant's counsel to read law books, or to make an argument on the law of the case, or to state what he claimed to be law, to the jury: *People v. Anderson*, 44 Cal. 70; *Proffatt on Jury Trials*, sec. 253.

As we have seen, this was an action in equity: *People v. Moore*, 29 Cal. 428; *Courtwright v. B. R. & A. W. & M. Co.*, 30 Id. 576, 577. An abatement of a nuisance is accomplished by a court of equity by means of an injunction proper and suitable to the facts of each case: *Wood on Nuisances*, secs. 777-794.

The complaint alleged and the court found that a nuisance existed and was continuous; the answer denied all the material allegations of the complaint. While it is true that the prayer of the pleading above referred to did not expressly ask for the issuance of an injunction, yet it did ask "that said nuisance be abated." The relief granted was consistent with the case made by the complaint, and embraced within the issues made by the pleadings, and was therefore entirely proper: *Code Civ. Proc.*, sec. 580.

There is a substantial conflict in the evidence as to whether the plaintiff was, at the time of the institution of the action, employed by the defendant to remove the "pile of hair and flesh" that constituted a part of the nuisance complained of.

The defendant complains that the court instructed the jury that damages could be recovered against him after the commencement of the action. It appears, however, that the plain-

tiff waived all damages for anything that had occurred after the filing of the complaint, and the case being one in equity, the verdict of the jury was merely advisory to the court: *Sweetser v. Dobbins*, 65 Cal. 529.

The defendant's counsel makes a very strenuous argument that in effect the verdict, judgment, and findings, as he claims, most improperly pronounced the smoke-stack of the defendant to be a nuisance.

The language of the decree or judgment upon that subject is as follows: "It is adjudged and decreed that said defendant is perpetually enjoined from allowing soot to issue from the smoke-stack on the premises," etc.

The findings show that the issuance of this soot from the smoke-stack above mentioned was a nuisance of a most disagreeable character to the plaintiff and his family.

We are not informed from the record but what this smoke-stack might have been used in such a way, both readily and easily, as that soot would not have issued therefrom. But be that as it may, it is said by this court in the case of *Tuebner v. California Street R. R. Co.*, 66 Cal. 174: "The keeping of a hotel or a restaurant is a lawful and very necessary business, . . . yet it could not be held that a person carrying on such business, or any requiring a large consumption of fuel, could erect his chimney to a height that would discharge the smoke and soot into his neighbor's windows. It is true, as argued by appellant, that persons preferring to live in the city rather than the country must accept many inconveniences, — probably all that flow naturally and necessarily from the concentration of populations; but that doctrine should not be carried too far. The law looks to a medium course to be pursued by each for the mutual benefit of all." Tested by this rule, we do not see why the plaintiff should not be restrained from so using his smoke-stack as that the soot issuing therefrom shall be prevented from being a disturbance, annoyance, and source of positive injury to the defendant and his property.

Nor could the board of supervisors of the city and county of San Francisco grant a license to the defendant which would permit him materially to impair the plaintiff's property rights. They could and did grant the defendant a license to erect and maintain his steam-engine, but they neither could nor did license him thereby to create a nuisance: *Tuebner v. California Street R. R. Co.*, *supra*.

Upon the whole case, the record of which as well as briefs

of counsel and authorities there cited we have carefully examined, we are of opinion that the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

JURY TRIAL.—Where the distinct provinces of the court and of the jury are recognized, and the former is held to be the exclusive judge of the law, as the jury are of the facts, it is clearly improper for counsel to argue questions of law to the jury, or to read law books or extracts therefrom in the course of their argument. In the first place, such a course savors of disrespect to the judge on the bench, as it suggests to the jury that there are other exponents of the law to whom they may look in making their decision, and invites them to accept the law as read by the attorney, rather than as set forth in the instructions which the court is to give to them before they retire for deliberation. In the next place, whenever the jury is to be influenced by something which is stated to them and in their presence, as law applicable to the case, it ought to be in the form of instructions to which the opposing party may, if he so wish, reserve an exception. Otherwise, he is without redress, if that which is stated as law is, in truth, not the law at all; or if, though being sound law when properly applied, it is entirely inapplicable to the case under consideration. Besides, the reading of law books in the course of an argument must tend to confuse as well as mislead the jury. It distracts their attention from the facts of the case. The reading of such books may be permitted in the discretion of the court, if pertinent, by way of illustration; but if its apparent object is "to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court," it should be checked by the judge, unless perhaps in those cases where the jurors are judges of the law as well as of the facts: *Proffatt on Jury Trials*, sec. 253; *People v. Anderson*, 44 Cal. 70.

NUISANCES.—Businesses, though lawful in their nature and of great public or private benefit, must be so conducted as not to constitute nuisances. Otherwise, they will be enjoined. This rule was applied to lead smelting-works, in *Appeal of the Pennsylvania Lead Co.*, 42 Am. Rep. 534; to slaughter-houses: *Pruner v. Pendleton*, 40 Id. 738; *Minke v. Hofeman*, 29 Id. 63; to the operation of a steam-engine: *Dettman v. Repp*, 33 Id. 325; *McKeon v. Lee*, 10 Id. 659; to rolling-mills emitting smoke and cinders: *Wesson v. Washburn I. Co.*, 90 Am. Dec. 181; to a blacksmith's shop: *Fancher v. Grass*, 60 Iowa, 505; *Norcross v. Thoms*, 81 Am. Dec. 588; to a powder-magazine: *Emory v. Hazard Powder Co.*, 53 Am. Rep. 730; to potteries emitting dense volumes of soot and smoke: *Ross v. Butler*, 97 Am. Dec. 654. and note. See note to *Rouse v. Martin*, 51 Am. Rep. 467-475.

BARRY v. TERKILDSEN.

[72 CALIFORNIA, 264.]

PLAINTIFF IS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, because, assuming a sidewalk in a populous city to be safe, she permitted her attention to be momentarily attracted in another direction, and fell into a hole in such sidewalk, from which the covering had been removed.

FACT THAT ACT OF THIRD PERSON MAY HAVE CONTRIBUTED to the final catastrophe will not exonerate a defendant sued for injuries resulting from an act which is unlawful, or is so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continually presents to innocent persons.

SIDEWALK. — One who maintains a hole in a sidewalk in front of his premises in a populous city, over which is a movable trap-door, is answerable to a person who is injured by falling through such hole at a time when it was open and unguarded, though it is not shown by whom the door was removed and the hole left open and unguarded.

RIGHT TO KEEP OPENINGS IN SIDEWALKS in front of one's premises, if it exists at all, must come from legislative declaration, municipal license, or general usage.

ACTION for damages for injuries suffered from falling through a hole in a sidewalk, Judgment for plaintiff.

F. M. Husted, for the appellant.

J. D. Sullivan and Horace G. Platt, for the respondent.

By Court, **McFARLAND, J.** Plaintiff, a girl about nineteen years old, started somewhat in a hurry from her father's house, about nine o'clock in the morning of October 11, 1880, to go to school. Appellant owned the adjoining premises, and in the sidewalk in front of said premises there was a hole covered by a wooden trap-door, which appellant used for his private convenience. This hole was only a few feet from the entrance to the residence of plaintiff's father. On the morning above referred to, this hole was opened, and entirely unguarded and unprotected. As plaintiff went out of the house, her attention was attracted for a moment by some children playing on the street, and not noticing the hole, after taking a couple of steps she fell headlong into it. The hole was quite deep, and plaintiff was very seriously injured by the fall. She had been accustomed to travel over this sidewalk daily on her way to and from school, and never knew before that the hole was there. The premises are on Post Street,— a populous street of the city of San Francisco. The evidence did not show who had removed the trap-door from the top of the hole. The jury found a verdict in favor of plaintiff for

three thousand dollars, and defendant appeals from the judgment, and from an order denying a new trial.

Appellant makes many of the points which are usually raised in actions for damages of the class to which the case at bar belongs.

In our opinion, there is nothing in the point that respondent was guilty of contributory negligence. A sidewalk of a street in a city not near a crossing may be taken by one passing over it to be a safe and not a dangerous place. In this case, the respondent had a right to presume that the sidewalk was in the same condition in which she had always found it; and the fact that her attention was momentarily attracted in another direction—a thing of the most common occurrence to travelers along a street—falls far short of that contributory negligence which in law defeats an action for damages.

Most of the other points made by appellant in various forms, when grouped together, present this proposition or theory: that as respondent failed to show that appellant, or any one of his employees or servants, removed the trap-door from the hole, and did not negative the theory that a stranger might have removed it, therefore there is a want of proof of that negligence which is the gist of an action for personal damages.

To this proposition there is a multitude of authorities, more or less applicable; and they are widely divergent. We think, however, that through the numerous cases upon the subject may be seen a distinction which is determinative of the case at bar. When a person pursues a business or does an act perfectly lawful in itself, and not in its nature so hazardous or so conducive to injury as to be of the character of a nuisance, then he can be held liable for injuries to others arising therefrom only when he has been guilty of negligence in his manner of carrying on the business or doing the act. But when the act is unlawful, or is in its character so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons, then the party is liable, although the agency of a stranger may have contributed to some extent to the final catastrophe. At least, in such a case, the injured party ought not to be compelled to show affirmatively that there was no intervention of a third person which contributed to the result.

Whether or not appellant had any lawful authority to maintain the excavation and trap-door at all is a somewhat doubtful question; but the weight of authority seems to be to the point that he had not. There is no evidence in the case of any custom, nor does it appear whether or not appellant had the fee to any part of the street. Judge Dillon, in his work on municipal corporations, states what seems to be a fair summing up of the authorities on the subject. At section 699, speaking of the right to make "openings in sidewalks," he says: "If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot-owner would, it seems clear, have no right, as against the public, or the municipality charged with the control of the streets, to appropriate them to this use. . . . If the fee of the street is in the adjoining owner, as it frequently is, the question as to the rightfulness of such a use of the sidewalk may not be so plain; and yet even in this case the public right must be paramount to individual interests, and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial uses, as the public good or convenience may from time to time require. . . . The correct view would seem to be that all rights of this character must come from legislative declaration or municipal license, express or implied from general usage."

Appellant showed no right from legislative declaration, municipal license, or general usage.

But if there be any principle upon which there could be based a right of appellant to maintain the excavation and trap in the absence of any municipal action upon the subject, that right would disappear before an ordinance of the city, which was introduced in evidence by respondent. The ordinance was passed in July, 1880, and was a re-enactment of a similar ordinance passed in May, 1866. The first part of section 6 of said ordinance is as follows: "No person shall construct, or cause or suffer to be constructed, under the sidewalk adjoining any premises belonging to him, or in his possession or under his control, any area or vault, except in conformity with the following specifications." Then follows a large number of specifications, which provide with particularity how such vaults and their coverings shall be constructed,—no one of which does appellant show a compliance with. They provide for the use of stone, brick, and iron, and against the use of

wood. In the latter part of the section it is provided as follows: "No aperture through the sidewalk into a vault shall exceed a superficial area of twenty-four square feet. Every such aperture shall be covered with an iron cover, and shall be securely closed when not in actual use." It affirmatively appears that the covering or trap-door of the vault of appellant was wooden, and that a few days before the accident he had employed a man to repair it with wooden planks. It appears, therefore,—1. That appellant had no authority of law to maintain the structure; and 2. That its maintenance was in direct violation of law.

Moreover, an excavation in the sidewalk of a populous street of a city, with a movable cover, liable to be removed by any careless or mischievous passer-by, is so dangerous a pitfall as to be, in its character, of the nature of a nuisance; and when not authorized by law, it would be a hard rule to require an innocent party injured thereby to prove that the injury was not caused in part by the act of a third person. No such rule is applicable to the facts of this case.

It appears that a few days before the accident, appellant employed a Mr. Krone to make a few repairs to the house situated on appellant's premises, and also to repair one of the planks on the trap-door in the sidewalk,—all to cost six dollars.

There is no evidence that any act or negligence of Krone contributed to the accident; but appellant, assuming, we suppose, that Krone's negligence might have so contributed, invokes the principle that the owner of premises is not responsible for the negligence of an independent contractor. But if such a trivial contract could bring that principle into action in any case, it would not, under the views herein expressed, be a defense in the case at bar.

Appellant's specific objections to the refusal of the court to grant a nonsuit, and to the giving and refusing of certain instructions to the jury, simply raise, in various forms, the questions above discussed. We think that the nonsuit was properly denied, and that the case was correctly and fairly given to the jury.

There was no error in the instructions that "plaintiff, if entitled to a verdict, is entitled to damages for her pain and suffering, both bodily and mental."

Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

Hearing in bank denied.

CONTRIBUTORY NEGLIGENCE IN VOLUNTARILY PASSING OVER STREET KNOWN TO BE DANGEROUS BY REASON OF ICE UPON IT: *Schaefer v. Sandusky*, 31 Am. Rep. 533; *City of Erie v. Magill*, 47 Id. 739; *City of Quincy v. Bacher*, 25 Id. 278. The fact that one's attention while passing along a public street is arrested by some object of interest or curiosity, causing him to stop, or not to give attention to his immediate surroundings, does not present such a case of contributory neglect as to preclude his recovery for injuries received: *Hussey v. Ryan*, 54 Id. 772. For cases brought to recover for injuries suffered from falling into holes in streets or sidewalks, see *City of Montgomery v. Wright*, 47 Id. 422; *Braker v. Town of Covington*, 35 Id. 202. A landlord is not answerable if the hole or excavation was made by permission of the city, covered in a safe and substantial manner, and the injury arose through the act of a third person, whereby the stone supporting the cover of the hole was broken, of which act the landlord had no knowledge: *Wolf v. Kilpatrick*, 54 Id. 672.

FOR EXCAVATION MADE BY CITY in or near a public highway, and left unguarded, it is answerable for injuries sustained by a child, who, while at play, fell into such excavation: *City of Indianapolis v. Emmelman*, 58 Am. Rep. 65.

FOR OBSTRUCTION OR EXCAVATION IN PUBLIC STREET, made by the lot-owner, and not licensed by the municipal authorities, he is answerable, irrespective of the question of his negligence. "The public are entitled to an unobstructed passage upon the streets, including the sidewalks of a city, but a structure such as that proved in this case was an obstruction. It was sufficient for the plaintiff to prove that in passing along the sidewalk he was injured by this structure, which was appurtenant to defendant's premises": *Clifford v. Day*, 81 N. Y. 56.

RIGHT OF ONE USING STREETS OF CITY AS PLAY-GROUND, as where a child was injured while rolling a hoop, or playing tag, to recover for injuries sustained from defects in a street has been questioned, on the ground that the use was one not contemplated by law. But it is believed that the using of streets for purposes of play or recreation will not defeat the recovery of an injured person, unless, taken with other facts, it shows that he was guilty of contributory negligence: *City of Chicago v. Keefe*, 55 Am. Rep. 860, and note.

LIABILITY OF MUNICIPAL CORPORATION FOR NON-REPAIR OF STREETS: See note to *Browning v. Springfield*, 63 Am. Dec. 350-355, and to *Perry v. City of Worcester*, 66 Id. 434-442.

PALMER v. HOWARD.

[72 CALIFORNIA, 298.]

UNDER EXECUTORY CONTRACT OF SALE RESERVING TITLE UNTIL PAYMENT is made, a bona fide purchaser from the vendee acquires no valid claim to the property.

POLICY OF LAW IS AGAINST UPHOLDING SECRET LIENS AND CHARGES to the injury of innocent purchasers and encumbrancers for value.

MORTGAGES. — The provisions of the law concerning mortgages cannot be evaded by mere shuffling of words.

INSTRUMENT IS MORTGAGE, no matter what the parties may characterize it, where it clearly appears therefrom that for all practical purposes the ownership of the property is intended to be transferred and a lien for the purchase price reserved to the seller.

INSTRUMENT IS MORTGAGE, AND NOT EXECUTORY CONTRACT OF SALE, where it recites the loan of certain articles, that if the price set against them is paid they shall belong to the borrower, otherwise to the lender; that notes or drafts given are not to be considered payments till paid; that the borrower agrees to pay the prices named; that the property is not to be removed from a designated lot without the assent of the lender; and that if the borrower fail to meet any of the payments, the lender may take the property and dispose of it, rendering to the borrower all surplus after paying the price agreed upon, etc.

ACTION of claim and delivery. Judgment for plaintiffs.

Levi Chase, for the appellant.

W. J. Hunsaker, for the respondents.

By Court, HAYNE, C. The plaintiff delivered to one St. Clair and wife certain personal property, under a writing, of which the following is a copy:—

“SAN FRANCISCO, March 26, 1885.

“D. PARKER ST. CLAIR AND WIFE, San Diego, Cal.:—Borrowed and received of Palmer and Rey, 405–407 Sansome Street, San Francisco, the following articles in good order. If the price set against them is paid, as per memorandum below, the property is then to belong to said borrower; otherwise, it remains the property of Palmer and Rey. Notes and drafts, or renewals of the same, if given, are not to be considered payment until they are paid. In the mean time the borrower is to keep the property in good order, and agrees to pay the price as per memorandum below, keep the property sufficiently insured for the benefit of the said Palmer and Rey, depositing the policy of insurance with them, and may use the property free from any other charge.

“Said property is not to be removed from lot L, in block thirty-six (36) in the city of San Diego, Cal., without the writ-

ten consent of Palmer and Rey. Should said borrower fail to meet any of the payments at the time specified, or to keep the property satisfactorily insured or in good order, then Palmer and Rey may take the said articles and dispose of them to the best advantage, rendering to said borrower all surplus, if any, after paying the price agreed upon and the expenses of removal and sale."

Then follows a list of the articles, and a specification of the installments of the price, amounting in all to \$2,295.45.

The St. Clairs paid but one installment of the price, and did not keep the property insured, but mortgaged the same to the defendant for \$925, and subsequently left for parts unknown.

The question is as to the effect of the agreement quoted.

It is settled in this state that even *bona fide* purchasers from the person to whom personal property is delivered, under an executory contract of sale, get no valid claim to the property: *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Id. 598. This is in accordance with the great preponderance of authority elsewhere: *Harkness v. Russell*, 118 U. S. 663. The reason is, that in such cases the title to the property does not pass, and the maxim, *Nemo plus juris*, etc., applies.

But in applying this rule, it must be remembered, in general, that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or encumbrancers for value, and in particular, that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to give notice to the world of the character of the transaction. These provisions as to mortgages cannot be evaded by any mere shuffling of words. Where it is clear from the whole transaction that for all practical purposes the ownership of property was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any mere denial of its legal effect, will not be regarded. The question, it is true, is one of intention; but the intention must be collected from the whole transaction, and not from any particular feature of it.

In the present case, it seems to us that the intention must be taken to have been to transfer the ownership of the property, reserving a security for the price, and nothing more. The possession was delivered. The promise to pay was absolute:

Hart v. Barney & Co., 7 Fed. Rep. 553. If Palmer and Rey, on reselling the property, had sued the St. Clairs for the difference between the agreed price and what the property brought on the resale, we see no defense the latter could have made. Moreover, Palmer and Rey were bound to resell the property if they repossessed themselves of it. They could not have kept it as an owner; and not only so, but they were bound to resell for the benefit of the St. Clairs. The provision is, that if they retake they shall sell "to the best advantage, rendering to said borrower all surplus, if any, after paying the price agreed upon, and the expenses of removal and sale." This is not a feature of an executory contract of sale. It is the chief characteristic of a mortgage, and is the very sum and substance of proceedings for foreclosure. In a controversy between debtor and creditor, as to whether a transaction was a mortgage or a sale, such a stipulation would be conclusive that it was a mortgage. Why should it have a different import in this case?

We think, therefore, that the intention was to vest the substantial ownership in the St. Clairs, and that the sole object of the seller was to secure payment of the price; and this intention appears from the provisions of the contract itself. Such being the case, the statement that the property "remains the property of Palmer and Rey," etc., is inconsistent with the nature of the transaction, as shown by the contract itself, and is a mere disguise for the purpose of evading the requirements of the law as to mortgages of personal property. To sustain the position of respondent would be, in effect, to add to the chapter on mortgages a provision that in every case where personal property is sold the seller may take a mortgage thereon for the price, and that, too, without the affidavit and recording which are required in the cases where such mortgages are allowed.

This conclusion is not in contravention of the cases cited by respondent. For in none of them, except, perhaps, a case from an inferior court of New York (21 Barb. 581), did the provision above referred to exist. On the other hand, it is in accordance with the decision of the supreme court of the United States in *Heryford v. Davis*, 102 U. S. 235, which was not in reference to any local law. That court maintains to its fullest extent the rule as to conditional sales which prevails in this state: *Harkness v. Russell*, 118 Id. 663. But it

held that the features above adverted to took the case before it out of the general rule.

For these reasons, we advise that the judgment and order be reversed, and the cause remanded for a new trial.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

Hearing in bank denied.

CONDITIONAL SALE, WHEN ACCOMPANIED BY DELIVERY OF POSSESSION of the property to the vendee, is well calculated to enable him either to make a sale of the property, or to obtain credit upon his apparent ownership of it, and thereby to entrap innocent purchasers and encumbrancers. On this account such sales are not looked upon with favor, and, in some of the states, they will not be sustained when brought in conflict with the interests of bona fide purchasers and encumbrancers, nor even as against judgment creditors who have levied upon the property as that of the vendee: *Murch v. Wright*, 46 Ill. 487; 95 Am. Dec. 455; *Schweitzer v. Tracy*, 76 Ill. 345; *Stadtfeld v. Huntsman*, 92 Pa. St. 53; 37 Am. Rep. 661; *Brunswick v. Hoover*, 95 Pa. St. 508; 40 Am. Rep. 674; *Vaughn v. Hopson*, 10 Bush, 337.

But the very decided preponderance of the authorities is to the contrary, and maintains that, in these cases, as well as in others, one who purchases property or obtains a lien thereon, must ascertain for himself, as best he can, what is the title of the party with whom he deals, and that in no event can his title be any better than that of his vendor: *Sanders v. Keber*, 28 Ohio St. 636; *Bailey v. Harris*, 8 Iowa, 331; 74 Am. Dec. 312; *Moseley v. Shattuck*, 43 Iowa, 543; *Miller v. Steen*, 30 Cal. 402; 89 Am. Dec. 124, and note; *Morgan v. Kidder*, 55 Vt. 370; *Ketchum v. Brennan*, 53 Miss. 596; *Mount v. Harris*, 1 Smedes & M. 185; 40 Am. Dec. 89; *Haak v. Linderman*, 64 Pa. St. 499; 3 Am. Rep. 612; *Zuchtman v. Roberts*, 109 Mass. 53; 13 Am. Rep. 663; *Cole v. Berry*, 42 N. J. L. 308; 36 Am. Rep. 511; *Lewis v. McCabe*, 49 Conn. 140; 44 Am. Dec. 217; *Aultman v. Mallory*, 5 Neb. 178; 25 Am. Dec. 478; *Sumner v. Woods*, 67 Ala. 139; 42 Am. Rep. 104; *Loomis v. Bragg*, 50 Conn. 228; 47 Am. Rep. 638; *Singer M. Co. v. Cole*, 4 Lea, 459; 40 Am. Rep. 20; *Freeman on Executions*, sec. 124.

QUESTION WHETHER TRANSACTION IS MORTGAGE OR CONDITIONAL SALE. —The question still remains, however, whether a particular transaction is really a conditional sale, or whether the parties have put it in the form of such a sale for the purpose of concealing its real nature, and of obtaining the advantages of a conditional sale when their real transaction is of an entirely different character. Thus, in many of the states, there are provisions with respect to the mortgage of chattels, under which such mortgages are required to be executed with certain formalities, and, generally, to be recorded in some public office of the county; and in some of the states the class of personal property which may be the subject of a valid chattel mortgage is very limited. In order to evade the provisions of the statutes regarding chattel mortgages, there are many instances in which the transaction is put in the form, or called by the name, of a conditional sale. Recently the courts have been inclined to scrutinize these transactions more closely, and

to refuse to be bound by the name and form given them by the parties, if satisfied from the whole transaction that it was not a conditional sale.

With respect to the construction of contracts claimed to be conditional sales, the supreme court of the United States has very wisely said: "The answer to this question is not to be found in any name which the parties may give to the instrument, and not alone in any particular provision it contains, disconnected from others, but in the ruling intention of the parties, gathered from the language they have used. It is the legal effect of the whole which is to be sought. The form of the instrument is of little account": *Heryford v. Davis*, 102 U. S. 243.

The contract here in question was between two corporations, one of which was a builder of cars, and the other the owner and operator of a railway. It recited that the former had constructed certain cars to be used on the railway of the latter for hire, and that the former loaned the latter the said cars for hire on such railway for the period of four months, and not elsewhere; that the railway company had executed to the manufacturing company three certain notes, which were to be collected at maturity, and their proceeds held as security for the return of the cars when demanded, and that the railway company had the privilege of purchasing the cars at any time on paying the price fixed by the contract; that until such payment it should have no right, title, or interest in the cars, except to use them, and no power to dispose of, mortgage, or pledge them; and that the cars were to be delivered to the manufacturing company when demanded, in default of the payment of said sum, with interest; that, on default in the payment of any of said notes, the manufacturing company might take possession of all of said cars, and retain all payments made on any of such notes, and would sell said cars, and return to the railway company any surplus remaining out of the net proceeds of the sale over and above the amount due on the unpaid notes; and, finally, that, on the payment of all of the notes, the manufacturing company would convey the cars to the railway company. This contract was construed not to be a conditional sale, but an attempt to obtain or reserve a lien in a form forbidden by the laws of the state; and the property was held to be subject to execution against the railway company.

The grounds of this decision were, that no price of the hire is mentioned or alluded to; that the manufacturing company took notes for the full price of the cars, and exacted security for their payment, and would therefore realize the price of the cars before the four months had elapsed; that no part of the money was to be returned to the railway company in any event, and in the event of the cars being taken from the railway company and sold, it was entitled to such portion of the proceeds of the sale as remained after paying the demands of the manufacturing company. "In view of these provisions," said the court, "we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railway company, in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of the same. The railway company was not accorded an option to buy or not. They were bound to pay the price, either by paying the notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of the debt is the very essence of a mortgage, which has no existence in the case of a conditional sale."

[IN BANK.]

PEOPLE v. KRAKER.

[72 CALIFORNIA, 459.]

TERM "ACCOMPLICE" INCLUDES ALL PERSONS concerned in the commission of an offense, irrespective of the grade of their guilt.

UNCORROBORATED EVIDENCE OF THIEF will not justify the conviction of one indicted for receiving stolen goods, knowing them to have been stolen.

WHETHER WITNESS IS ACCOMPLICE is a question of fact for the jury

PROSECUTION for receiving stolen goods, knowing them to have been stolen. The defendant was convicted, and his motion for a new trial denied.

C. Ben Darwin and Crittenden Thornton, for the appellant.

George A. Johnson, attorney-general, for the respondents.

By Court, **PATERSON, J.** Defendant was convicted of the crime of receiving stolen goods, knowing them to have been stolen.

At the trial, one **H. G. Matthewson**, who was charged in the information with the stealing of the goods, was a witness against the defendant,—evidently the principal witness.

At the conclusion of the testimony and argument, the defendant asked the court to instruct the jury substantially in the language of section 1111 of the Penal Code, which reads as follows:—

"A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

The court refused to give the instruction asked, and in the charge to the jury, referring to the claim of defendant's counsel that Matthewson was an accomplice, said: "I charge you in plain terms that if you believe the testimony of Horace G. Matthewson, and from that testimony you are satisfied to a moral certainty that the defendant did receive the property mentioned in the information from him, and that at the time of the receipt thereof by the defendant he knew and was informed that it was stolen property, and he so received it for

his own gain, or to prevent the owner from again possessing it, then you are authorized to convict the defendant on the testimony of said Matthewson."

Subsequently, on motion for new trial, the learned judge had some doubt as to the correctness of his instruction, but deeming it best to have the question settled, denied the motion, giving the defendant the benefit of a certificate of good cause.

We think the instruction given by the court was erroneous.

The proposition has never been directly passed upon in this state, but in *People v. Levison*, 16 Cal. 99, 76 Am. Dec. 505, the court, in commenting upon certain rulings, said:—

"It also leaves the inference that the unsupported testimony of the thief is sufficient to establish the defendant's guilt."

An accomplice includes all persons who have been concerned in the commission of an offense, and the grade of guilt of the witness is not important: *Abbott's Law Dict.*; *Cross v. People*, 47 Ill. 152.

In England, where there is no statutory provision against a conviction on the uncorroborated testimony of an accomplice, the judges always instruct the jury that the uncorroborated testimony of the thief in cases of this kind is not sufficient: *Regina v. Robinson*, 4 Fost. & F. 43; *Regina v. Pratt*, 4 Id. 315.

In that portion of the charge quoted above, the court took from the jury the question whether, as a matter of fact, Matthewson was an accomplice, considering, it seems, only the abstract proposition of law as to whether the mere fact that the witness was the thief made him an accomplice of the one who received the goods. But the question as to whether the witness was an accomplice in the commission of the offense is a question of fact for the jury: *State v. Schlagel*, 19 Iowa, 169.

In Texas, under a statute like section 1111, *supra*, the court held that if the witness was an accomplice in any material fact, the jury should have been instructed as to the value of his evidence without corroboration: *Miller v. State*, 4 Tex. App. 251. And in Massachusetts it is held that "the court should instruct the jury as to what constitutes an accomplice, and leave it for them to determine whether the witness was in fact an accomplice": *Commonwealth v. Elliot*, 110 Mass. 106; *Commonwealth v. Ford*, 111 Id. 394.

Judgment and order reversed, and cause remanded for new trial.

June, 1887.]

MILLER v. DUNN.

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SEARLS, C. J., and MCKINSTRY, McFARLAND, THAYER and SHARPSTEIN, JJ., concurred.

Rehearing denied.

TESTIMONY OF ACCOMPLICES — ADMISSIBILITY AND WEIGHT OF: See note to *Commonwealth v. Price*, 71 Am. Dec. 671-678.

[IN BANK.]

MILLER v. DUNN

[72 CALIFORNIA, 44.]

WORDS USED IN CONSTITUTION WILL BE ACCORDED their popular rather than their technical signification, unless the nature of the subject, or the text, suggests their use in their technical sense. They must be taken in their ordinary and common acceptation, because they are presumed to have been so understood by their framers and by the people.

WORD "LAW," AS USED IN CONSTITUTION, generally signifies a statute, bill, or legislative enactment, regardless of its constitutionality or validity.

STATUTES WILL NOT BE ADJUDGED UNCONSTITUTIONAL, if there is a fair doubt as to their validity.

UNCONSTITUTIONAL LAW IS NOT VOID AB INITIO IN ALL CASES. It will protect citizens dealing with public officers under its provisions until it is adjudged unconstitutional.

CONSTITUTIONAL LAW. — Legislature may authorize payment of a claim created under and by virtue of an unconstitutional law, though it is declared by the constitution to have no power to authorize the payment of any claim created without express authority of law.

APPLICATION for writ of *mandamus* to compel the defendant, Dunn, as state controller, to draw his warrant for the payment of certain claims as required by the act of the legislature of California, approved May 10, 1885. This act was claimed to be invalid under section 32, article 4, of the state constitution, which is as follows: "Section 32. The legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay, or to authorize the payment of, any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." The writ was ordered to issue. The controller appealed.

D. M. Delmas, for the appellant.

A. L. Hart, James A. Waymire, and William C. Belcher, for the respondent.

By Court, PATERSON, J. In 1880 the legislature passed an act entitled "An act to promote drainage," which was approved by the governor April 23, 1880: Stats. 1880, p. 123.

In the passage of this act, all the proceedings necessary to the effective enactment of a law by the legislature were had; and it was regularly and duly approved by the governor.

According to the provisions of this act, "Drainage District No. 1" was regularly organized, and public work under it commenced. The directors of the district, after proposals for bids, let contracts to different parties to do various parts of the work,—as they were expressly authorized by the act to do. Respondent, among others, took two such contracts, and the amount involved in this action is for work and labor done and materials furnished under such contracts. There is no question as to the justness of his claims. But after he had done the work and furnished the materials under his contracts, and before he had received his pay therefor, sued for in this action, this court, in an action brought against the directors of said district, decided that said "act to promote drainage" was unconstitutional. All proceedings under said act ceased, and the state controller refused to pay any more claims under it.

This being the situation, and some just claims acquired under the act remaining unpaid, the legislature passed an act, approved March 10, 1885 (Stats. 1885, p. 78), entitled "An act to appropriate money to pay the indebtedness incurred under an act entitled, 'An act to promote drainage,' approved April 23, 1880." This act expressly requires the controller to draw his warrants in favor of certain audited claims which accrued under said act of 1880; and plaintiff's demand here sued for is admitted to be one of such claims.

The appellant, controller, refused to draw his warrants for respondent's claims, and this proceeding in *mandamus* was instituted to compel him to do so.

The court below granted a peremptory writ, and the controller appeals.

The judgment of the court below should be affirmed.

It is claimed by appellant that the act of April 23, 1880, having been held to be unconstitutional in the case of *People v. Parks*, 58 Cal. 624, was void ab initio, the same to all in-

tents and purposes as if it never had been enacted,—a pure nullity; that an unconstitutional law is no law at all for any purpose, and that the word “law,” in article 4, section 32, was used in its full sense, i. e., a valid constitutional law. On the other hand, it is contended by respondent that the word “law” in its popular sense is a statute passed by the legislature, and approved by the executive, and it is in this sense that the word was employed in section 32.

It is useless to attempt to apply iron-clad rules of interpretation to any phrase or word used in a constitution. Especially is this true of a word which has a technical as well as a popular meaning. There is no word in the language which, in its popular and technical application, takes a wider or more diversified signification than the word “law,”—its use in both regards is illimitable. In determining the office of words used in a constitution, the object is to give effect to the intent of the people adopting it: Cooley on Constitutional Limitations, 5th ed., sec. 66. And “where a word having a technical as well as a popular meaning is used in the constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the text suggests, that it is used in its technical sense”: *Weill v. Kenfield*, 54 Cal. 111; *Sprague v. Norway*, 31 Id. 174. Words used in a constitution should be construed in the sense in which they were employed. They “must be taken in the ordinary and common acceptance, because they are presumed to have been so understood by the framers, and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense”: *Manly v. State*, 7 Md. 135. The term “law,” as used in its popular sense, and in its common acceptance by “those for whom laws are made,” it may be admitted, includes the whole body or system of rules of conduct, including the decisions of courts as well as legislative acts, but it certainly does not include that refined, technical, and astute idea claimed by appellant, which recognizes nothing within the meaning of the term which is not constitutionally and technically perfect.

In addition to considering the independent, technical, and popular meanings of a word used in an act or constitution, we

may look at other sections of the same instrument for the sense in which the word is used, as an aid to determine whether it has been used in its popular sense in the particular provision under consideration: *People v. Eddy*, 43 Cal. 331; 13 Am. Rep. 143. A word repeatedly used in a statute will bear the same meaning throughout the instrument, unless it is apparent that another meaning is intended: *Pitte v. Shipley*, 46 Cal. 154; *Hoag v. Howard*, 55 Id. 564. Upon an examination of the provisions of the constitution in which the word "law" is used, it will be found in a majority of instances that it has been employed in the sense of a statute, bill, or legislative enactment, regardless of the constitutionality or validity of the act. Thus it is said: "No law shall be passed to restrain or abridge the liberty of speech or of the press": Sec. 9, art. 1. "No *ex post facto* law shall ever be passed": Sec. 16, art. 1. "The enacting clause of every law shall be as follows": Sec. 1, art. 4. "The legislature shall not pass local or special laws in any of the following cases," etc.: Sec. 25, art. 4. "The legislature shall not pass any laws permitting the leasing . . . of any franchise": Sec. 10, art. 12. When speaking of certain requisites of a valid law, however, the framers of the constitution did not use the words "act" and "law" interchangeably. Thus it is provided that "no bill shall become a law without the concurrence," etc.: Sec. 15, art. 4. "Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor": Sec. 16, art. 4.

Again, it is provided that "the making of profit out of county, city, or other public money, or using the same for any purpose not authorized by law, . . . shall be a felony." Can it be said that those who framed and adopted the constitution intended to use the word "law" in this section to mean a law absolutely unimpeachable on any ground?—that every officer should handle and place the moneys intrusted to him at his peril, no matter how fair and regular the law directing him may be on its face? If yea, "then indeed," as was said in *St. L. & S. F. R. R. Co. v. Evans and Howard Brick Co.*, 85 Mo. 307, "are the rights of the citizen to be sacrificed on the altar of mistake, and the statute is to be made a veritable pitfall and snare." And so it is with respect to section 32. If it places a citizen who has dealt with the state—under circumstances like those in the case at bar—beyond the pale of legislative relief for acts done by him prior to discovering the invalidity of the law, it will be very unsafe for any one to deal

with our officers, unless he be possessed of that superhuman intuition or mediate intelligence which alone can tell how the question of the validity of such an act may be raised and determined after he has performed the work.

Of course there is no moral obligation on the part of the state which can be enforced upon equitable principles, nor does the good faith of the party dealing with the state cut any figure in the case, if, in fact, the work was done "without express authority of law"; for this provision was placed in the constitution to cut off all claims based upon mere good faith and equity. There was a feeling, which had been long-suffering, that there should be some inhibition to prevent the legislature from allowing the payment of extra compensation to officers who, subsequent to their election or appointment, discovered that the regular salary was insufficient, and also to prevent relief bills in favor of those who had dealt with state and municipal officers, acting without express authorization from any source, or under palpably unauthorized and invalid contracts, and who were constantly asking the legislature to consider their misfortunes in pity, and regard them as deserving subjects of public benevolence. All this was doubtless well understood, and the phrase "without express authority of law" was used in view of the judicial and legislative history of the state, and yet it is by no means clear that it was intended to prevent the payment of a just claim, expressly authorized by an act in due form, duly passed and approved, and within the scope of lawful legislation, simply because after the work has been done, the court may, upon great deliberation and searching investigation, declare the act for some reason—such as defect in title or wrongful delegation of power—unconstitutional.

The case of *Nouques v. Douglass*, 7 Cal. 65, relied on by appellant, is unlike the case at bar. In that case, and in *People v. Johnson*, 6 Id. 499, the legislature had contracted a debt admitted to be in excess of the three-hundred-thousand-dollar limit specified in the constitution, and the court held that until the claim was legalized by being submitted to a vote of the people, it could not be paid. There is no doubt as to the correctness of the decision in those cases. The constitutional inhibition contained in article 8 of the old constitution was so clear that the conclusion, as said by the court, was "most obvious." The meaning of words similar to those in question here were not involved in that case. The court had no doubt

as to the meaning of the language used in article 8, and if we could say the same of section 32, which is before us, we should, of course, apply the same rule.

But it follows, we think, from what has been said, that the meaning contended for by appellant is not necessarily implied in the language of section 32; and if there be a fair doubt as to the true construction of that section, we should refrain from declaring that the legislature and the governor have exceeded their authority in the passage and approval of the act of March 10, 1885, appropriating money to pay the indebtedness incurred under the so-called drainage act of April 23, 1880.

The doctrine has been so often enunciated it has passed into an aphorism, that statutes will not be declared unconstitutional if there is a fair doubt as to their validity. The judicial department will not hesitate to interfere with the work of a co-ordinate branch of the government when the latter goes beyond its constitutional limitations, but the ground of interference must be plain and substantial. Again, it is not a universal rule, as claimed by appellant, that an unconstitutional law is void *ab initio*, and absolutely wanting in all binding force, and a nullity. There is at least an exception, viz.,—that an act duly passed or approved has the force of law to protect citizens dealing with public officers under its provisions up to the time that it is declared unconstitutional: *Sessums v. Botts*, 34 Tex. 335. And if a decision that an act is unconstitutional be afterward overruled, the statute will be deemed to be valid for the whole period: *Pierce v. Pierce*, 46 Ind. 86. It has been held that an act creating an office, though unconstitutional, is sufficient to give color of title, and that an officer acting under it is an officer *de facto*: *Duff's Appeal* (*Commonwealth v. McCombs*), 56 Pa. St. 436; *Clark v. Commonwealth*, 29 Id. 129. But whether this be supported by the weight of authority or not, "nothing is better settled," it is said in *State v. Douglass*, 50 Mo. 596, "than that the acts of an officer *de facto* (although his title may be bad) are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Without this rule, the business of a community could not be transacted. . . . It would cause a suspension of business till every officer's right *de jure* was established": *State v. Carroll*, 38 Conn. 462; 9 Am. Rep. 409; *Harbaugh v. Winsor*, 38 Mo. 327; *Wilcox v. Smith*, 5 Wend. 231; 21 Am. Dec. 213; *People v. Salomon*, 54 Ill. 39; *Ex parte Strang*, 21 Ohio St. 610. It must be remembered that the act

of April 23, 1880, was judicially declared unconstitutional solely on the ground that under article 3 of the constitution the legislature could not delegate to executive officers such legislative powers as it had attempted to confer by that act. This was the only ground upon which the minds of a majority of the members of the court met: *People v. Parks*, 58 Cal. 645. It has never been claimed seriously that the work contemplated by the act was beyond the power of the legislature to provide for in some manner. If the legislature had defined the boundaries of the several districts, instead of delegating the power to the judgment of the governor, surveyor-general, and state engineer, and had provided, in the manner it did provide, for the appointment of the three directors who were authorized to let, and who did in fact let, the contracts for the work, the result might have been different. The act has not been declared to be and is not necessarily unconstitutional in all of its parts. It is true, this court held that the directors had no authority to contract, but the creation of the office of director by the act, the appointment by the governor of three directors, and the ostensible authority conferred upon them by the act to contract, furnish some color of right to do the thing attempted by them.

I do not wish to be understood as saying that the directors were officers *de facto*, with color of authority sufficient to bind the state, notwithstanding the unconstitutionality of the act under which the contract was let, and without regard to the provisions of section 32 as to "express authority of law." I cite the cases upon the effect of the acts of officers *de facto* simply to show that an unconstitutional law is not always and for all purposes a nullity, so far as the rights of a citizen are concerned, and refer to the history of the case simply in illustration of my conclusion that after a citizen has dealt with the state under circumstances like those shown here, the case does not come within the purview of section 32, and the legislature is not prohibited thereby from authorizing the payment to him of such reasonable sums as shall to it seem proper. It is unnecessary to say whether in all cases an act duly passed and approved would be "express authority of law" within the meaning of that section. There may be statutes palpably violative of principles so plain and well understood as to be no authority or protection at all; but as to that I express no opinion.

Judgment affirmed.

SEARLS, C. J., and MCFARLAND and SHARPSTEIN, JJ., concurred.

TEMPLE, J., dissented. He denied that there was any common usage or popular sense in which the word "law" was given any other signification than that of a valid law; and insisted that as the constitutional phrase was "without express authority of law," the word "law" was there used in its technical sense, for it could not be assumed that it was intended that a claim might be authorized by a law which was in itself without authority, and therefore invalid. He further contended that even were there no express constitutional prohibition, the legislature would be without power to authorize the payment of a claim created in violation of the constitution, and in support of this position relied upon *Nouques v. Douglass*, 7 Cal. 65. He also was of the opinion that the statute under consideration operated as a gift to the beneficiaries, and was therefore forbidden under section 31, article 4, of the constitution, which declares that the legislature shall not have power "to make any gift, nor authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation, whatever." Upon this point he said: "It is admitted that the contract is utterly void; that it imposes no legal liability or obligation on the part of the state. The state has received, and will receive, nothing from the parties to whom this money is to be given. True, if the contract had been valid in legal contemplation, the state would have received a consideration in the service performed by reason of the contract, although there was nothing of benefit in it. Now, a gift is something bestowed without return. If this be not something bestowed without return, what is the thing returned? Can there be any other reason for holding this appropriation not a gift except that it would be highly inequitable and unjust not to compensate the respondent for services rendered pursuant to an act of the legislature believed to be valid? In other words, the claim is founded upon a moral obligation, which the state ought to recognize and satisfy. This construction, I submit, virtually repeals sections 31 and 32, article 4, of the constitution. What sense is there in prohibiting the contract, and declaring it void, if the legislature may nevertheless voluntarily perform the contract on the part of the state? What practical purpose is served by forbidding gifts of the people's money or property, if the legislature can recognize and discharge a moral obligation? The legislature must be the judge of the moral obligation, and would rarely ever care to make a gift where it could not claim the existence of a moral obligation. My brothers deny, as I understand the decision, that they hold any such doctrine. I hope this will prevent the decision from being regarded as a precedent upon this question; but will it? I have shown that, disclaim it as they will, such is the real ground of the decision. Our successors will justly claim that it can be sustained on no other theory. This is the excuse for all relief bills. Can any one deny that the sole purpose of the provisions was to prevent this very legislation? But I do not care to pursue the subject further. The constitution itself directs how laws shall be made, and of course the law meant must be a law passed as in the constitution provided. The whole claim seems to me baseless. A void contract based on a void law, ratified against the express prohibition of the constitution, constitutes a valid claim against the state."

The decision in the principal case was received with surprise by the bar of the state in which it was made, and was generally spoken of as one in which

the equities of persons doing work, and advancing materials under the drainage act of 1880, had proved too strong for the law. The claims existing under the drainage act of 1880 were contracted in unquestioned good faith on the part both of the commission and of the contractors and laborers who sought employment under it, and were such as ought to be paid, if it were possible to so construe the constitution as to permit their payment.

Either unconstitutional enactments must be treated as void, or the attempt to fix any bounds of legislative authority must be abandoned. Legislators, when attempting to exercise an authority interdicted by the constitution, have no more legislative sanction for their act than has a judge in pronouncing judgments with respect to subject-matters over which he has no jurisdiction. In neither case has the act or judgment any legal existence. To enforce this rule may operate harshly and to the prejudice of a few individuals who were so unfortunate as to mistake the law fixing limits to judicial and legislative authority. But not to enforce it is to subject the whole community to laws and decrees against which the fundamental law had guaranteed protection. If it be once established that a law is valid until judicially declared to be unconstitutional and void, then the legislature is invited to pass unconstitutional laws under the judicial assurance that they will operate at least until the judicial machinery, always tardy in action, has been set in motion, and enabled to mark them with the stamp of condemnation. If a statute is unconstitutional, and claims created under it are therefore invalid, how can they be validated by a subsequent statute, without announcing a rule of law to the effect that where the legislature has no power to enact a law it may nevertheless enact such law?—that such enactment, though not valid, may, if carried into effect, be followed by a further enactment validating, or at least compensating, the acts done under the first unauthorized enactment? See *Phelan v. San Francisco*, 6 Cal. 540; *Cooley on Constitutional Limitations*, 188; *Fisher v. McGirr*, 61 Am. Dec. 381; *Osborn v. United States*, 9 Wheat. 868.

LIABILITY OF PERSONS ACTING UNDER UNCONSTITUTIONAL STATUTE: See note to *Kelly v. Bemis*, 64 Am. Dec. 51–55.

COBURN v. GOODALL.

[72 CALIFORNIA, 493.]

ASSIGNEES OF LEASE HOLDING UNDIVIDED INTERESTS THEREUNDER in unequal proportions, as tenants in common, are jointly and severally liable to the lessor for a breach of a covenant to repair or to surrender possession.

EMINENT DOMAIN.—Order of judge putting plaintiff in possession of lands pending proceedings for their condemnation is void.

RETURN OF SHERIFF ON WRIT OF RESTITUTION IS PRIMA FACIE EVIDENCE only of the fact therein stated, in California.

JUDGMENT IN EJECTMENT DOES NOT PRECLUDE PLAINTIFF FROM MAINTAINING a subsequent action to recover damages for withholding possession of the premises, where the record in the former suit shows that all claims for such damages were withdrawn.

JUDGMENT IN EJECTMENT IS NOT CONCLUSIVE AS TO TIME OF OUSTER, when all claims for mesne profits and damages were withdrawn.

LESSOR IRREVOCABLY ELECTS TO TERMINATE LEASE when he brings an action of ejectment against the leasees, or their assignees, to recover the leased premises. Therefore, he cannot recover for rent subsequently falling due, though no judgment has been rendered in the action of ejectment.

RIGHT TO SUE FOR BREACH OF COVENANT TO SURRENDER POSSESSION IS NOT WAIVED by a subsequent action of ejectment for the demised premises, in which the recovery of damages is not sought.

IN DETERMINING AMOUNT OF DAMAGES SUSTAINED BY FAILURE TO SURRENDER LEASED PREMISES to the lessor, the amount of profits derived by the defendants from a wharf and chute adjacent thereto is a proper subject of inquiry, providing it is not taken as the measure of damages. It is proper to put the court in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the quantum of damages can be deduced.

INTEREST IS NOT ALLOWABLE in an action for the breach of a contract, if the damages sought to be recovered are so unliquidated and uncertain that they must be made certain by proof and adjudication.

ACTION by plaintiff, in his own right, and as assignee of his co-lessor, Clark, against the defendants as assignees of a lease, to recover damages sustained by a breach of a covenant therein contained for the surrender of possession at its termination. The lease was made January 1, 1863, by the plaintiff and Jeremiah Clark to James Brennan, who assigned an undivided half to defendant Sudden, who assigned one fourth to defendant Fake. Brennan's remaining half-interest in the lease was assigned to defendant O'Farrell, who assigned one eighth to defendant Goodall, one eighth to defendant Wensinger, and one eighth to defendant Nelson. During the pendency of the action, a dismissal was entered as to defendant Fake, and defendant O'Farrell died. No attempt was made to make his representatives parties to the action. The defendants refused, at the termination of the lease, to wit, October 1, 1872, to surrender five acres of the leased premises known as Pigeon Point. An action of ejectment was brought by the plaintiff against the present defendants and others to recover possession of the lands now in controversy, in which action a wharf and chute built from the shore on the demised premises below low-water mark into the ocean were claimed to be a part of the premises, on the ground that they had been affixed to the land, or had become an incident or appurtenant thereto. The plaintiff recovered judgment, which, on appeal, was modified by striking therefrom so much thereof as includes the wharf and chute below the line of high water: See *Coburn v. Ames*, 52 Cal. 385; 28 Am. Rep. 634; and 57 Cal. 201. Subsequently this action was begun, and resulted in a judgment for the

plaintiff against the defendants Sudden, Goodall, Nelson, and Wensinger, for \$10,000 as damages, sustained by the breach of the covenant sued upon, and the additional sum of \$6,520 interest.

McAllister and Bergin, and Fox and Kellogg, for the appellants.

Garber, Thornton, and Bishop, and Craig and Meredith, for the respondent.

By Court, PATERSON, J. It was decided in *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634, that the wharf and chute were not on the demised premises, were not affixed or appurtenant thereto, and therefore were not "improvements" within the meaning of that term as used in the lease. The court held that the plaintiff had no such right to the possession of the land below the line of high water as to enable him to maintain ejectment, and the judgment of the lower court was modified accordingly. Pending the appeal in that case, a receiver was appointed in the trial court to take possession of the property, collect tolls, and manage the wharf and chute. After judgment was modified in accordance with the order of this court, the receiver, under directions from the court in which he was appointed, paid over all the money in his hands to the plaintiff. The defendants, among whom were Goodall and Nelson, defendants herein, again appealed to this court, and it was held that as the plaintiff was not entitled to the possession of the wharf and chute, he was not entitled to all of the profits derived from the use of them pending the litigation. The cause was accordingly again remanded for the adjustment of the accounts: *Coburn v. Ames*, 57 Cal. 204.

This action was commenced on November 25, 1875. The lease which is made the basis of this suit contained a covenant that Brennan, the lessee, at the expiration of said lease, would surrender to Coburn and Clark (the lessors or their assigns), with such improvements as shall have been erected or made thereon, but there was nothing in the covenant providing in terms that the lease should be binding upon the assigns of the lessees.

The defendants are all assignees of undivided parts amounting to five eighths of the whole interest in the lease, viz.: Sudden one fourth, Goodall one eighth, Nelson one eighth, and Wensinger one eighth.

The action as to defendant Fake, who owned one quarter, was dismissed. The other defendant, O'Farrell, who owned one eighth, died pending the action, and his representative has never been substituted. Judgment was rendered against the defendants Sudden, Goodall, Nelson, and Wensinger for \$10,000, with interest thereon from commencement of suit,—\$6,520,—total \$16,520,—and costs of suit.

It is claimed that these four defendants, if liable at all under the covenant to surrender (which is denied), are liable only in respect of their privity of estate, and that such liability is several and proportionate to the interest acquired by each of them. To this proposition we cannot assent. There are some authorities to that effect, but the weight of opinion, we believe, is contrary thereto, and with better reason it is held that while assignees of a lease hold as tenants in common, they are jointly and severally liable on covenants to repair and to deliver up at the end of the term. These covenants, which are connected with the estate, run with the land, and vest in point of benefit and liability in the assignee, while the personal privity of contract between the lessor and lessee remains unaffected by the transfer: 1 Washburn on Real Property, 329, 435; 2 Platt on Leases, 351; Taylor on Landlord and Tenant, 7th ed., sec. 530, note; *Hayes v. Morrison*, 38 N. H. 95; *Fitch v. Johnson*, 104 Ill. 117.

The authorities cited, which relate to questions concerning the apportionment of rent, are not applicable, as payment of rent is an exception to the rule: Freeman on Cotenancy, sec. 346.

The demurrer was properly overruled, if our view of the liability of tenants in common, assignees of the whole of the demised premises, though in unequal proportions, is correct, i. e., that they are jointly and severally liable on all covenants and obligations of the assignors, except perhaps the payment of rent. The possession of one of the tenants is the possession of all. There is no unity of interest, title, or time as in joint tenancy, but as to unity of possession they are identical. So far as enjoyment of possession goes, they are all equal, whatever may be the difference in shares held by each. If they are not jointly and severally liable, one tenant in common owning a small undivided interest might prevent the delivery of the property in its entirety, which the lessor is entitled to under his contract, with or without an express covenant therefor. We see no hardship in this rule, for the

assignees in possession, upon authority and in reason, stand in the shoes of the lessee; and so long as they occupy such relation to the lessor and his property, they are bound by the terms of the contract with the lessee and the obligations implied therefrom by law. While one of the tenants in common remains, the unity of possession is undivided; and as to those at least who continue in possession by themselves or by agents, the unity of obligation flows from unity of possession.

There is nothing in the judgment which will prevent the four defendants against whom it was entered from enforcing contribution from Fake and the representatives of O'Farrell, if the right to contribute exist.

The evidence is sufficient, we think, to sustain the finding that the defendants continued in possession of the five-acre tract from the expiration of the lease to the time this action was commenced. This tract or parcel, as described by the court in its findings, is "commonly known as Pigeon Point shipping point, and used for the purpose of handling and shipping freight, and lying above and bounded on one side by ordinary high-water mark." As between these defendants and this plaintiff, the grant of the wharf franchise by the board of supervisors to Templeton and Moore in 1870 is immaterial. It was the duty of the defendants to deliver to plaintiff the possession of the five-acre tract. We think there was evidence sufficient to warrant the court below in finding that Ames did not deprive the defendants of possession. There was evidence tending to show that defendants were using the name of Ames as a disguise for their own possession. Furthermore, there seems to be no longer any doubt that orders like that of the district judge made in the case referred to September 27, 1872, putting plaintiffs in the possession of the land during the pendency of the action for condemnation, are void: *Sanborn v. Belden*, 51 Cal. 266; *San Mateo Water Works v. Sharpstein*, 50 Id. 284. With respect to the possession which it is claimed Coburn secured by virtue of the writs of restitution served in the case of *Templeton and Ames v. Coburn and Clark*, it is sufficient to say that the evidence is conflicting as to the fact of possession. The return of the officer upon the writ was only *prima facie* evidence of the fact stated: Pol. Code, sec. 4178. Plaintiff testified that he had no actual possession; that the moment the sheriff left "they just jumped right in and took possession again."

It is claimed by appellant that the ejectment suit of Loren

Coburn, as plaintiff, v. Josiah P. Ames, Ellen Templeton, administratrix of the estate of Horace Templeton, Charles Goodall, Christopher Nelson, and George C. Perkins, defendants, commenced on the sixteenth day of January, 1885, and the findings and judgment therein, establishes an election by Coburn to treat Goodall and Nelson as trespassers, dissolves all their relations with him as assignees of said lease, and adjudicates facts which are inconsistent with the claim of plaintiff in this action. In that case all claim for damages, the findings therein show, was expressly withdrawn by plaintiff. If this had not been done, there is no question that the judgment would be conclusive on the question of damages, as it was made an issue in the case. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense": Freeman on Judgments, sec. 249. When, however, the record on its face shows that the issue was withdrawn from the consideration of the court, the presumption that it was adjudicated no longer applies. The right to recover possession, and the right to recover mesne profits, were not necessarily united in the action in ejectment. The right to join causes of action for both is a mere privilege granted by statute.

That the record in that case is not an estoppel as to the time of ouster is equally clear: *Yount v. Howell*, 14 Cal. 465; for if the question of mesne profits may be considered out of the case by virtue of the finding of a withdrawal thereof, then there were but two other questions which could have been material in that action of ejectment, viz., right of entry by plaintiff, and wrongful possession of defendant, on the day suit was commenced.

Appellant claims further that the bringing of the suit in ejectment was an election of a remedy inconsistent with this action, and concludes him from maintaining the latter. The rule stated in the *syllabus*, taken from *Jones v. Carter*, 15 Mees. & W. 718, is doubtless correct: "The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterward (although there has not been any judgment in the ejectment) sue for rent due,

or covenants broken, after the service of the declaration." That was an action of covenant in a mining lease, in which breaches were alleged, the first for non-payment of rent, and others for violation of covenants requiring defendants, during the continuance of the demise, to keep six men searching for mineral for certain periods in each year, for keeping legible accounts of ore extracted, etc.; but the principal question related to rent. The case before us, however, is not for rent, or for damages caused by a breach of covenant subsequent to the commencement of the ejectment suit. The plaintiff's right to recover both possession and damages arose immediately upon the failure of the defendants to deliver at the expiration of the lease, and in both actions the defendants are treated as wrongfully in possession, and charged with a continuous wrongful withholding from the time the covenant was broken down to the commencement of the action.

There was evidence to support the finding of the court that Wensinger and Sudden continued in possession of the tract from the expiration of the lease to the commencement of the action. It is not for the appellate court to say that the court below ought to have believed certain witnesses rather than the one on whose testimony the finding is based. There are circumstances tending to corroborate plaintiff's testimony and claim that Scotty held possession for and as agent of Wensinger and Sudden. Coburn failed to obtain possession under the written surrender executed by Sudden to him, and of course, if such failure was due in any degree to the act or neglect of Sudden, it was inoperative: *Kower v. Gluck*, 33 Cal. 406.

It is claimed that the court erred in allowing, against the objection of defendants, evidence as to profits derived from the wharf and chute; that such was improper *data* for the assessment of damages, and it will be presumed that injury resulted from the admission of such evidence. The court evidently did not hold that the defendants were bound to deliver the wharf, nor was the amount of profits derived from the wharf and chute taken as the measure of damage; otherwise a much larger sum would have been fixed by the court as the damage suffered by plaintiff. In determining the amount of damage sustained by plaintiff, we think that the question of profits derived from the wharf was a proper subject of inquiry, providing it was not taken as the measure of damage.

If it be true that the defendants were wrong-doers in refusing to deliver possession to plaintiff, the question is, How

much was Coburn damaged by the failure of the defendants to do what it was their duty to do? If it be assumed that those profits would necessarily have been less, if they had delivered to him the portion above high water, retaining the part below themselves, it was easy to arrive at and deduct the difference. All he had to do was to complete it, and the cost of completion was capable of demonstration. He was not allowed to recover as such the profits of the whole property. But in this, as in similar cases, it was proper and necessary to put the court in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the quantum of damage was to be deduced.

The court below allowed damages for the detention only of that part of the demised premises which it found was actually and exclusively detained, used, and possessed by the defendants from the expiration of the lease, October 1, 1872, to the commencement of this action, November 24, 1875; and whether we take into consideration the results flowing from the acts of defendants under the doctrine of encroachment contended for by plaintiff or not, ten thousand dollars, the principal amount of damages allowed, is reasonable and just.

We think, however, that the court erred in allowing interest on the ten thousand dollars. Section 3287, Civil Code, reads as follows: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." But the damages were unliquidated and uncertain, and could only be made certain by proof and adjudication.

Where the plaintiff's claim was an uncertain and unliquidated demand, and the amount due could not be ascertained from the face of the contract, but was to be settled by process of law, this court has held that interest *eo nomine* cannot be allowed: *Brady v. Wilcoxson*, 44 Cal. 245. Nor could interest be allowed under section 3288, Civil Code, for interest under this section can only be allowed for the breach of an obligation not arising from contract, and then only in case of oppression, fraud, or malice. If plaintiff shows any case at all, it is for breach of an obligation which does arise from contract, and the court so finds.

It is therefore ordered that the judgment be and it is

hereby modified by striking therefrom the sum of \$6,520, and as so modified the judgment shall stand.

TEMPLE and MCKINSTRY, JJ., concurred.

Hearing in bank denied.

ASSIGNMENT OF LEASE does not discharge the assignor from the obligation to pay rent, nor from any other obligation assumed by him in the lease; nor can he, by an assignment of a portion of the demised premises, compel his lessor to apportion the rent: Taylor on Landlord and Tenant, sec. 438; *Bailey v. Wells*, 76 Am. Dec. 233.

WHILE LESSEE CANNOT RELIEVE HIMSELF from the express and implied covenants of the lease by an assignment, yet such assignment makes the assignee answerable on such covenants if the lessor chooses to pursue him: *State v. Martin*, 52 Am. Rep. 167; *Childs v. Clark*, 49 Am. Dec. 164; *Van Rensselaer v. Hays*, 19 N. Y. 93; *Stewart v. L. I. R. R. Co.*, 55 Am. Rep. 844; *Van Rensselaer v. Bradley*, 45 Am. Dec. 451. If the assignment is for a specific part of the demised premises, and the covenant is divisible, it will attach upon such "parcel *pro tanto*, and the assignee will be answerable for his proportion only of any charge upon the land which was a common burden upon the whole": Taylor on Landlord and Tenant, sec. 443. But an assignment must be for the whole term in the land, or some part thereof. If the lessee assign for less than the whole term on the land, subject to the assignment, this is a mere subleasing, and the lessor cannot recover rents from the sublessee. For remedies of lessor against assignees and sublessees, see note to *Fulton v. Stuart*, 15 Am. Dec. 543-545.

LIABILITY OF TENANTS IN COMMON, HOLDING AS ASSIGNEES OF LEASED PREMISES. — The principal case maintains that where several persons become the assignees of a lease as tenants in common, "they are jointly and severally liable on covenants to repair and to deliver up at the end of the term." As a consequence of this rule, the court affirmed a judgment against part only of such tenants in common, for the entire damages resulting from a refusal to surrender possession of the demised premises at the termination of the lease. While the opinion, in effect, states that there are authorities against as well as for the proposition, it adds that the weight of opinion is in favor of the rule adopted by the court. The rule as here maintained may be correct; but we have been unable to discover any authorities either affirming or denying it. The relevancy of the cases cited by the court is not apparent. The decision upon this topic must be regarded as a pioneer. So far as the obligation to pay rent is concerned, it seems to be conceded that assignees holding as tenants in common are not answerable for each other, but that each is liable for rent of the moiety held by him, and for that only: *Babcock v. Scoville*, 56 Ill. 461; *Fulton v. Stuart*, 2 Ohio, 216; 15 Am. Dec. 542; *Van Rensselaer v. Jones*, 2 Barb. 653.

ASSIGNEE OF LEASE MAY TERMINATE HIS LIABILITY thereunder by assigning his interest, and delivering possession to another, that the latter may be an insolvent or a beggar: *Johnson v. Sherman*, 76 Am. Dec. 481. An assignee is answerable only for rents accruing and covenants broken while he is assignee, and not after he has parted with his interest and possession: *Childs v. Clark*, 49 Id. 164, and note.

INTEREST, WHEN ALLOWABLE: See note to *Van Rensselaer v. Jewett*, 51 Am. Dec. 277-279; *De Larallete v. Wendt*, 31 Am. Rep. 494; *Old Colony v. Miller*, 28 Id. 194; *Wyman v. Robinson*, 40 Id. 300.

CONNOR v. STANLEY.

[72 CALIFORNIA, 556.]

INSANITY. — Belief in spiritualism does not of itself show insanity, unless it amounts to a monomania.

BURDEN OF PROOF RESTS UPON ONE CLAIMING TO BE SPIRITUALISTIC MEDIUM, to show that a contract made by him with one having implicit belief in the existence of the powers claimed by such medium was free from undue influence.

RELATION OF PECULIAR TRUST AND CONFIDENCE EXISTS BETWEEN ASSUMED SPIRITUALISTIC MEDIUM and a believer in his alleged powers, which raises the presumption that an advantage obtained by the former over the latter resulted from undue influence.

ACTION to recover from the defendant, as administrator of the estate of William Jarvis, the value of certain bonds which Jarvis agreed to give to plaintiff in an antenuptial contract, made in anticipation of their marriage. The marriage was never celebrated. Judgment for the defendant.

R. T. Derlin, William H. Beatty, and A. P. Catlin, for the appellant.

A. C. Freeman, G. E. Bates, and G. L. Johnson, for the respondent.

By Court, **TEMPLE, J.** The contract on which this action is founded is set out in full on the former appeal (65 Cal. 184). It is there said to be valid as an antenuptial contract. The defendant set up as a defense that at the time the alleged contract was made his intestate was insane and incapable of entering into a contract, and that it was procured by the use of undue influence by the plaintiff.

The court found that all the allegations of the complaint were true, except as to the capacity of Jarvis to contract, and that all the affirmative matters set up in the answer were true, except that plaintiff and P. B. Nagle did not, nor did either of them, coerce Jarvis otherwise than by taking advantage of his weak and unsound mind.

The findings, therefore, plainly cover all the issues in the case, and the only question for our consideration is, whether there is any evidence which could justify the conclusion. Upon this proposition there can be no doubt.

1. There was evidence tending to prove insanity generally, and not merely that he was insane on the subject of spiritualism. J. Miller, an intimate acquaintance, thought he was insane. To the same effect is the testimony of Mrs. A. Walker,

J. W. Houston, S. B. Lusk, and Lee Stanley, and it is shown that plaintiff herself stated that she believed him insane. And then there is much testimony as to facts which would tend to show an unsound mind.

2. There is much testimony tending to prove that Jarvis was insane on the subject of spiritualism. That there is such evidence is not controverted, but counsel indulge in a long argument, and cite many authorities to the point, that a belief in spiritualism does not prove insanity. As an abstract proposition, no doubt this is so. The law pronounces no one insane for mere religious belief, no matter how unreasonable it may appear to the judge. But this does not meet the case made. A belief in the doctrines maintained by the Methodists, Presbyterians, or the Catholics would not establish insanity. Still, one might be a monomaniac as to either form of religion; and so as to spiritualism. And that is precisely the effect of the great mass of testimony in this case.

3. There is much evidence tending to show undue influence. It is established that the relation between the parties was confidential, in consequence of her claim to power as a medium, through which she had great control over him. This being established, the burden was cast upon her of showing that there was no undue influence. The rule applies with peculiar force to the relation of one and his priest, confessor, clergyman, or spiritual adviser, and certainly with no less force to the relation between one who is a firm believer in, not to say a monomaniac upon, the subject of spiritualism, and the medium in whom he has confidence, and upon whom he habitually relies.

The cases upon the subject are numerous, but the law, so far as applicable here, is crystallized in the Civil Code. Section 2219 provides that every one who voluntarily assumes a relation of personal confidence with another is a trustee, and section 2235 raises the presumption that all transactions between such persons by which the person trusted obtains an advantage are entered into under undue influence. It becomes important, then, to inquire whether the relation did exist.

Jarvis was seventy-two years old, feeble both mentally and physically. He was a widower, his wife having died in August, 1881, a few months before the contract questioned here was entered into. He had lived for a great many years at Folsom a quiet life, with no family except his wife. They had had one child, a daughter, who married the defendant,

and died twenty years ago, leaving two children. Jarvis had been a music teacher, and had accumulated some property. He was for many years a firm believer in spiritualism. The belief had grown upon him, until, in the opinion of the witnesses, it had become a monomania. His mind would drift to the subject upon all occasions. He relied upon supposed spiritual advice in his business transactions. When warned against trusting certain persons, he said: "It will be all right in the next world; they are spiritualists." He sold a farm for two thousand dollars, to be paid for in installments of two hundred dollars a year without interest. He had been offered \$250 a year rent. He said the spirits told him he must sell; that he was governed entirely by the spirits. The purchaser was a spiritualist. He invested several thousand dollars in mines, under the supposed advice of spirits. Most of this money was lost. He offered a lady fifteen hundred dollars to attend seances and become a medium. To another lady he offered to convey a piece of land if she would become a medium. He believed he could reform all the convicts if he could get them to read a spiritualistic paper. He said he had got the right idea of spiritualism, and was going to publish a work which would astonish the world. He admitted that he was controlled by mediums.

One witness said he was a mental wreck from the time he lost his daughter, and there is much evidence that he became still worse after the death of his wife. His conduct was very strange during her last illness. He did not believe in giving her medicine or nourishment. The medium said she would die, and the spirits would keep her until then. He did not wish a doctor, as the spirits would do nothing if he had one. He objected to cooking being done in the house; the smell would keep the spirits out. The doors and windows must be left open so they could come in. He was angry when they gave her stimulants, because if she were to die intoxicated she would remain so in the spirit land. He knew of one man who was killed while drunk, and who was still drunk fifteen years after his death.

In this condition of health, mental and physical, Jarvis met the plaintiff. She is said by her counsel to be an artist, who has a studio in San Francisco,—a highly educated, refined, and accomplished lady. When Jarvis first made her acquaintance does not definitely appear, but it was evidently shortly after *the death of his wife*, when he went to consult her as a medium

to find out how much money he should give his granddaughter to use. In February, after Mrs. Jarvis's death, plaintiff was giving seances at Folsom. Jarvis had induced her to go there to be developed as a medium, and gave her fifty dollars per month to come. She remained on these terms for some three months, giving seances, which were attended by Jarvis, and to which he invited his friends. The evidence shows that he had the most exalted opinion of her powers as a medium, and that he was much under her control. He said himself that she had great influence over him when she was around. There is evidence that plaintiff herself said that she believed that Jarvis was crazy, and a medium could do anything in the world with him.

We think this is sufficient to show that there was evidence upon which the court could find the existence of a relation of a peculiar trust and confidence between them, similar to that between a religious devotee and his spiritual adviser, and the proof of which would throw upon the plaintiff the burden of showing fair dealing.

But the record contains evidence of undue influence and adverse pressure. Mrs. Walker testified: "Speaking of the time when the contract that is in suit here was executed, she said that they had had trouble and had words. She said that she wished him to settle something on her, and he asked her if she was afraid that he would not leave her anything, or would not leave her as well off as her other husband had left her, and she said that she locked the door and kept him in the room for about two hours, and that she put the key in her pocket. . . . They talked about the matter in my presence, and they both told me that which I have stated. She said that they finally came to a settlement, and he agreed to settle something on her, and she opened the door and got a boy and sent him down to Nagle's office, and he came up and drew a draught of the contract that day, and the next day she told me that Jarvis came in and she asked him if he would have a chair, and she said he acted queerly. Then she said that she told him he would not have time to sit down if he was going down to keep his word and sign that contract. He asked her what contract, and he said, 'I have made no contract.' . . . She said that at that time he acted as if he was either drugged or crazy, and that he did not act as if he knew what he was about, and did not seem to know that he had ever drawn up a contract. . . . She expressed her-

self as believing that he was an old fool, and did not know what he was about. She said at that time she believed that he was crazy."

There was evidence on the part of plaintiff contradicting some of this evidence, but this only creates a conflict. If we could consider the testimony, however, as a trial court, we could not say that the evidence does not sustain the finding.

Judgment and order affirmed.

McKINSTRY and PATERSON, JJ., concurred.

CONTRACTS WITH SPIRITUALISTIC MEDIUMS. — Conveyances and gifts to, contracts with, and devises in favor of persons believed by the grantor, donor, or testator to be spiritualistic mediums are attracting increased attention. In many instances, the claim is made that the grantor or donor was insane; and in proof of this, evidence of his belief in spiritualism and his placing himself under the guidance of professed mediums is generally offered and received. This evidence is commonly met with counter-evidence, showing his general soundness of mind, his perfect memory, his business sagacity, etc., and with the argument that as there are no means of testing the correctness of a man's religious belief, or his belief with respect to a future state, there is no evidence that his belief is mistaken, and certainly no proof that before entertaining and acting upon such belief he must have become demented. The principal case applies to the question well-settled general principles, by treating spiritualistic mediums just as other persons are treated who claim to exercise the functions of spiritual advisers, or who, from any other special relation, are implicitly trusted by the persons with whom they deal. The relations between spiritual teachers and their believers is one which is always liable to lead to undue influence, and the law has for many centuries guarded against it by imposing limitations upon gifts to the church. One who is believed to have the power of communicating with the spirit land is more dangerous than a mere priest; for who could refuse to yield to teachings which he believed came from departed friends, who possessed the secrets and the wisdom of our future state? We know of no instance in which a contract between a believer and a professed medium has been sustained. The leading case on this subject is that of *Lyon v. Home*, L. R. 6 Eq. 655. *Nottidge v. Prince*, 2 Giff. 246, and *Thompson v. Hawks*, 14 Fed. Rep. 902, are in the same line. All the cases show that it is incumbent on the person believed to possess supernatural powers to show affirmatively that the contract or gift was not the result of his undue influence. This is the general rule with respect to wills or gifts made in favor of spiritual advisers, even when the testator or donor is conceded to be of sound mind: *Norton v. Riley*, 2 Eden, 286; *Thompson v. Hefferman*, 4 Dru. & War. 285; *Marx v. McGlynn*, 88 N. Y. 370. Any delusion or condition which controls the mind and dominates the will and understanding avoids a contract. It is not necessary to show that a man is an idiot or a maniac to avoid his contract: *Jacox v. Jacox*, 40 Mich. 473; *Crowther v. Rowlandson*, 27 Cal. 381; *Bond v. Bond*, 7 Allen, 1; see also *Hides v. Hides*, 65 How. Pr. 17.

BELIEF IN SPIRITUALISTIC COMMUNICATIONS OR REVELATIONS is not of *itself* evidence of insanity sufficient to avoid a will, unless it be shown

that the testator surrendered his own judgment and will, and implicitly followed the supposed communications and directions from the spirit land; *Robinson v. Adams*, 16 Am. Rep. 473; see also *Brown v. Ward*. 36 Id. 422, and note.

ALLISON v. THOMAS.

[72 CALIFORNIA, 562.]

OMISSION OF INITIAL LETTER OF DEFENDANT'S MIDDLE NAME in proceedings against him in a justice's court is immaterial.

SHERIFF'S RETURN OF SERVICE OF SUMMONS MAY BE AMENDED after judgment in a justice's court, so as to show jurisdiction over the defendant, though in the mean time the defendant has conveyed premises levied upon under the judgment by a quitclaim deed.

QUITCLAIM DEED, or conveyance of all the grantor's right, title, and interest, vests in the purchaser only what the grantor himself could claim. The only exceptions to this rule are those founded upon the recording acts, or upon sales made under execution.

ACTION to quiet title. Both parties claimed under John C. McDonald, who was sued in a justice's court by the name of John McDonell. He was served with summons and copy of complaint, but the sheriff's return did not show the service of the copy of complaint. Judgment by default was entered, and execution issued against John McDonald, under which a sale was made of the land in controversy to the defendant, to whom a certificate of purchase issued, and it was duly recorded. McDonald then quitclaimed to plaintiff all his right, title, and interest in the same lands. Subsequently the sheriff, by permission of the justice, amended his return of the summons to accord with the facts, and as amended, the return showed the service of the copy of the complaint as well as of the summons. When plaintiff received his conveyance, he had no knowledge that a copy of the complaint had been served. Judgment for plaintiff, and defendant's motion for a new trial denied.

Harris and Allen, for the appellants.

Curtis and Otis, for the respondent.

By Court, **TEMPLE, J.** The omission of the initial letter of the middle name of McDonald, in the proceedings in the justice's court, is a matter of no consequence, and does not in any way affect the validity of those proceedings.

The rule undoubtedly is, that the record in the justice's court must show affirmatively jurisdiction of the person, or

the judgment will not be valid. Here there was in fact jurisdiction, but the return of the constable failed to show due service. After the judgment was entered, this record was amended, and as amended, did show jurisdiction. In the mean time, however, the land attached had been sold. The judgment debtor had also conveyed to plaintiff all his right, title, and interest in the land. As against the judgment debtor there was no impropriety in allowing an amendment to the record according to the fact. The officer may always amend his return if there are no intervening rights which would be effected. And we think it plain there was no error in allowing it as to the purchaser. He purchased the right, title, and interest of the judgment debtor, and took subject to all equities and secret defects.

We do not overlook the case of *Graff v. Middleton*, 43 Cal. 340, in which it was held that, under the twenty-sixth section of the recording act, then in force, a quitclaim deed received in good faith and for a valuable consideration would prevail over a prior unrecorded deed. That decision is made to turn upon the language of that statute defining the word "conveyance." This ruling was followed in *Frey v. Clifford*, 44 Cal. 343, where the description of the estate conveyed was "all my right, title, and interest" of the grantor.

Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described: *Coe v. Persons Unknown*, 43 Me. 432; *Blanchard v. Brooks*, 12 Pick. 47; *Brown v. Jackson*, 3 Wheat. 449; *Adams v. Cuddy*, 13 Pick. 460; 25 Am. Dec. 330; *Allen v. Holton*, 20 Pick. 458; *Sweet v. Brown*, 12 Met. 175; 45 Am. Dec. 243; *Pike v. Galvin*, 29 Me. 183.

This construction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had, and subject to all defects and equities which could then have been asserted against the grantor. To this rule this court has made an exception founded upon the recording act, and still another has been recognized in reference to sales made by the sheriff under execution. There the statute provides that the purchaser acquires all the right, title, and interest of the judgment debtor.

It has been held that such deed is good as against a prior unrecorded deed: *Roberts v. Bourn*, 23 Me. 165; 39 Am. Dec. 614.

These are both exceptions to the general rule, founded upon special statutory provisions, and rather tend to confirm the rule than to overthrow it.

Judgment reversed and cause remanded.

McKINFREY and PATERSON, JJ., concurred.

AMENDMENT OF SHERIFF'S RETURN may be made after judgment, to show that process was properly served on the defendant: *Heflin v. McMin*, 20 Am. Dec. 58. This question is fully discussed in note to *Malone v. Samuel*, 13 Id. 173-181.

QUITCLAIM DEED, EFFECT OF: See *Johnson v. Williams*, post, p. 243, and note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

PHELPS v. BATES.

[54 CONNECTICUT, 11.]

IN CONSTRUING WILL, TESTATOR'S PARTICULAR INTENT, SHOWN BY SINGLE PROVISION STANDING BY ITSELF, MUST YIELD to the general leading intent, as manifested in the whole instrument.

WORD "OR" SHOULD BE CONSTRUED "AND" IN CLAUSE IN WILL, whereby the testator gave his son certain estate, with a gift over, if he should die "during minority or without issue"; and the estate would become infeasible in the son, at least as soon as he attained his majority.

ESTATE MAY BE MADE TO DEPEND UPON ONE OF TWO OR MORE ALTERNATIVE CONTINGENCIES, but the general rule is, that when an estate depends upon a double contingency, both must concur.

AMICABLE suit for construction of will.

H. C. Robinson, E. H. Hyde, Jr., and H. E. Taintor, for part of the defendants.

J. P. Andrews and C. H. Briscoe, for the other defendants.

By Court, CARPENTER, J. This is a suit for the construction of a will. The testator gave the bulk of his property to his son, then thirteen years old. The second section of the will reads as follows: "I give and bequeath to my only son, Allie Carlos Bates, all my estate, both real and personal, of every name, kind, or description, except what I hereafter donate in this will to the other legatees." Section 3 provides for his wife; sections 4 and 5 give legacies to two sisters; section 6 gives a legacy to a brother; section 7 provides for a step-son, and makes an additional provision for his wife; sections 8

and 9 provide for two other persons outside of the family. The will then proceeds as follows:—

“In my extreme embarrassment in making provision for unforeseen events, or cases of death, I am at a loss what to do, but decide upon the following, viz.: In the event of the death of my son Allie C. during his minority, or without family or issue, the bank stock and real estate, or home farm (so called), and stock, and household goods, etc., to go to —, and that she, Hannah S., shall share equally with my own family heirs in the division of all of the property which may be left or remain from my son Allie C., viz.: with Anson Bates’s heirs, Albert Bates, Flora B. Metcalf’s heirs, C. Laura Vandorn, Alfred Bates, and Mindwell D. Smith, or the heirs of each (if any) that may be deceased at that time,—seven equal shares in all. I do hereby direct the legacies in this will to be due six months after my decease. To be more explicit: I wish and design to give to my wife, Hannah S., the use and benefit of my home farm during her life, with the stock, tools, household goods, and implements on and belonging to the same, during her life, in the event of the demise of my son, Allie C., during his minority, or without issue or heir, before her decease (Hannah S.), and she to share equally in fee-simple with my six family heirs in all of the rest of my property given in this will to my son Allie C.”

Under this will two questions arise: 1. What estate does the son take? and 2. What estate does the widow take? In behalf of the son it is claimed that he takes an absolute estate, or at least an estate that becomes absolute on his attaining his majority. In behalf of the “family heirs,” it is contended that he takes either a life estate or a defeasible fee; and that the heirs take a remainder, or a gift by way of an executory devise.

In construing this will we must bear in mind that the general leading intent as therein manifested is evidently to give a very large portion of the estate to the son. He is first provided for. The second section gives an estate in fee-simple: *White v. White*, 52 Conn. 518. That ought not to be cut down to a less estate, unless we find a clear intention that it be done in the subsequent parts of the will.

We think it is very clear that the testator did not intend to give his son a mere life estate. There are in this will no less than five distinct life estates. In every instance such an estate is clearly expressed. The testator, or whoever draughted

the will, knew what language to use in order to create a life estate. When that was his intention it was not left to inference from words of doubtful construction. A defeasible fee, such as is here contended for, in the minds of most men could not be distinguished from a life estate. It is in effect only an estate for life, although it may not technically be termed a life estate. The presumption is, that if the testator had intended a defeasible fee he would have created a life estate, and thus have disposed of the remainder as he did in other instances. Instead of that he used appropriate language to give a fee.

The first nine sections dispose of all his property. His first and leading intention, as well as nearly all his minor and subordinate ones, are found in them. If they stood alone, no such question as now arises could have been made. What then did the testator intend by that portion of the will following the ninth section? That seems to have been suggested to him by contemplating the possibility of his son's early death. That that might occur before the will could take effect was evidently in his thoughts, as he assumes that his property in that event would go to his own heirs, and provides that his wife shall be admitted upon the same footing with his brothers and sisters. That assumption is inconsistent with the vesting of the property in the son by force of the will; for in that case the property would go to the heirs of his son instead of his own heirs. Hence there is some reason for construing this part of the will as meaning the death of his son during his own life. But if for any reason that is inadmissible, then we think it must mean the death of his son during his minority *and* without heirs or issue. Evidently he had in mind his death during the life of the mother, for the will makes her as one of the heirs. In the seventh section the death of the son during minority is spoken of by itself, and that event is provided for so far as the home farm is concerned. But in the portion following the ninth section, where only the expressions, "or without family or issue," or "without issue or heir," are found, they are coupled with the words, "during his minority."

On behalf of the heirs it is contended that the prominent and controlling intention of the testator was to prevent his property from going out of his own family. But we think that intention was contingent and secondary, while his primary and more important intention was to provide liberally

for his son. All his property is disposed of before these expressions are reached. They are used in making some change in the disposition of his property in a given possible contingency. Manifestly he regarded the provision for heirs as of minor importance. Until now they are not named, and here they are not named as devisees or legatees, but as heirs. There is no direct express gift to them. It is only by an implication from an assumption that the property, in case it becomes intestate, will go to them as his heirs, that it can be said that they are legatees at all. The leading thought in his mind seems to have been to make an additional provision for his wife, rather than make provision for his brothers and sisters; and this he did by making her as one of them. Incidentally and by implication the provision is for their benefit. So far as that was intended, it was a particular intent, the general intent being in favor of the wife. The former cannot prevail over the latter; much less over the general and all-important intent to give his property to his son.

Moreover, this was the matter which caused him "extreme embarrassment," concerning which he was "at a loss what to do." With doubt and hesitation, he finally decided "upon the following," etc. To call the part of the will thus produced the important part, containing the general intent, and construe it as prevailing over the intent to provide for his only son,—a matter concerning which he was not at a loss, did not hesitate, but was clear and decided,—would be absurd. We shall not be justified in inferring from a provision of that character an intention to cut down an estate in fee to a life estate, or which is, in effect, nearly the same thing, to a defeasible fee. The consequences of such a construction would be serious. The son would be left with nothing that he could call his own and enjoy, except the income; for it will be observed that everything given to the son is subject to this provision. That the testator intended such a result will not be presumed; and it ought not to be produced by construction, if the will will admit of any other rational interpretation. To avoid it, and at the same time give effect to the major intent apparent throughout the whole will to make his son his principal beneficiary, we feel justified in giving to the word "or" the meaning of "and"; so that the will in meaning will read "during his minority and without issue." Such a change gives effect to the intent of the testator, and hence is within the authorities on that subject.

Again, suppose the son had died while under age, but leaving issue. Then, if the words are to be taken literally and disjunctively, the issue would not have taken, but the estate would have gone to collateral heirs. Manifestly that would be contrary to the intention of the testator. To effectuate that intention, it would be necessary that the words should be taken in a conjunctive sense. And that would require both contingencies to concur in order to give effect to the limitation over. The general rule is, that when an estate depends upon a double contingency, both must concur. Doubtless an estate may be made to depend upon one of two or more alternative contingencies, but the supposition we have made shows that such was not the meaning of the testator in this case.

The case of *Williams v. Hubbard*, 2 Root, 191, is identical with this case so far as this question is concerned. An estate was given to a grandson, with this provision: "In case the grandson dies before he arrives at the age of twenty-one years, or before he has any heirs of his body, then the estate given to him shall go to the said daughters." It was held that the estate vested in the grandson on arriving at the age of twenty-one years, though he died without heirs of his body. The court say: "The dying without heirs is to be understood to relate to the time before he arrives at the age of twenty-one years."

If the testator intended death during his own life, or death during minority, then the estate becomes indefeasible in the son, at least as soon as he attains his majority.

The gift to the wife in the third section of the will is clear, and requires no construction. The provision for her benefit in the seventh section is contingent upon the son's dying during minority, and as that event can now never happen, we have no occasion to consider what interest she takes under that section.

The provision found in the concluding portion of the will is inoperative, for the reason given above.

The superior court is advised to render judgment in accordance with these views.

WHERE LANGUAGE OF TESTATOR IN HIS WILL IS PLAIN AND UNAMBIGUOUS, SUCH LANGUAGE MUST GOVERN: *Warner v. Miltenberger*, 83 Am. Dec. 573; but the testator's intention will prevail over words in his will; and it is the duty of all courts to give effect to such intention: *Eatherly v. Eatherly*, 78 Id. 499, and note 505; *Bell County v. Alexander*, 73 Id. 268, and cases in note 276; which is to be gathered from the whole instrument: *German v. German*,

67 Id. 451; but the intent of the testator does not control where it would violate law: *Brattle Square Church v. Grant*, 63 Id. 725.

CHANGING ONE WORD TO ANOTHER IN CONSTRUING WILL: See *Goode v. Goode*, 66 Am. Dec. 635, note; construction of "and" for "or," or *vice versa*: *Janney v. Sprigg*, 48 Id. 557, and note 565.

CONSTRUCTION OF WILL — "DYING WITHOUT ISSUE": *Matter of New York etc. R. R. Co.*, 59 Am. Rep. 478; *Quackenbos v. Kingland*, 56 Id. 771, and extended note 774.

HOLMAN v. CONTINENTAL LIFE INS. CO.

[54 CONNECTICUT, 196.]

LIFE INSURANCE — FORFEITURE OF PAID-UP POLICY. — A policy of life insurance provided that it should become void on failure to pay any annual premium, or interest annually in advance on any outstanding premium notes; but that, after the payment of two or more annual premiums, on default in the payment of any subsequent premium, the company would convert the policy into a "paid-up" one for as many tenth parts of the sum originally insured as there had been complete annual payments when default was made, provided application was made for such conversion within one year after default. The insured paid two annual premiums, a portion in cash, and the balance in premium notes still outstanding, made default in the payment of the next premium, and applied for a "paid-up" policy. Thereupon the company indorsed upon the policy that it was recognized as binding for two tenths thereof, "subject to the terms and conditions expressed in the policy." Thereafter the insured paid the interest on the outstanding premium notes, annually, in advance, for two years, and then ceased to pay the same. In an action to recover the amount due on the policy, *held*, that the company's indorsement upon the policy was equivalent to a "paid-up" policy, and that the failure to pay interest on the outstanding premium notes worked a forfeiture thereof.

"PAID-UP" POLICY OF LIFE INSURANCE MAY BE FORFEITED BY NON-PAYMENT of interest on premium notes, given for premiums accruing while the original policy remained in force.

NAMING POLICY OF INSURANCE NON-FORFEITABLE does not render inapplicable the rule that a writing must be construed by its terms, and if by these it is forfeitable, a defense showing the existence of facts, which by these terms create a forfeiture, must be sustained.

THE plaintiff was the beneficiary in a policy of insurance upon the life of W. W. Holman. The annual premiums were paid partly in cash and partly in premium notes, the interest of which was payable annually in advance. After making two annual payments of the portions of the premium due in cash, he made default, and applied for and received a paid-up policy for two hundred dollars, with conditions as shown in the opinion. The premium notes for the first two years remained outstanding. Interest was paid on them until 1876,

when default was made in paying such interest, and the question was, whether this default forfeited the policy.

H. B. Freeman, for the plaintiff.

T. M. Maltbie, for the defendant.

By Court, *LOOMIS, J.* The complaint in this case seeks to recover the amount due under a so-called "paid-up" policy of insurance on the life of William W. Holman, for the benefit of his wife. The demurrer to the defendant's answer raises the question whether the defense therein set forth is sufficient in law to prevent a recovery by the plaintiff, and this depends entirely upon the contract of the parties. By the terms of the contract as originally made, the defendant was to receive an annual premium of \$108.72 during the continuance of the policy for the term of ten years, payable, as appears from the margin, partly in cash and partly by note. At the end of the term, or upon the previous death of the insured, the defendant was to pay one thousand dollars, "deducting therefrom all indebtedness to the said company on account of this policy, if any, then existing," subject to sundry express conditions and agreements mentioned in the policy, the third and fourth of which only are involved in this case. These are as follows: —

"3. If the said assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same, and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof, or shall not pay, at maturity, any notes or obligations given for the cash portion of any premium or part thereof, — then, and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured; or any part thereof, except as hereinafter provided.

"4. If, after the receipt by the company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premium when due, then, notwithstanding such default, this company will convert this policy into a 'paid-up' policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid when such default shall be made; provided, that this policy shall be transmitted to and received by this company, and application made for such conversion within one year after such default."

The defendant's answer, after admitting the issuing of the policy, its terms and demand and refusal to pay, as alleged in the complaint, further alleged that, —

"2. On the first day of April, 1874, the plaintiff had paid to the defendant in cash a portion of two annual premiums, and had given to the defendant premium notes for the remaining portion of said premiums, which notes were then and are now outstanding and unpaid.

"3. Thereafter the plaintiff made default in the payment of premiums, and transmitted said policy to the defendant, and with his wife, Rebecca J. Holman, applied to the defendant to adjust the insurance under said policy, according to the stipulations thereof, by reducing the amount thereof to two hundred dollars; and in said application agreed to pay the defendant, annually, in advance, the interest on all outstanding notes given in part payment of annual premiums.

"4. Thereupon the defendant made the following indorsement upon said policy of insurance: 'This policy having lapsed after two annual payments is hereby recognized as binding upon the company for two tenths thereof, or two hundred dollars, subject to the terms and conditions expressed in this policy and in the quitclaim to this company, bearing even date with this entry'; and returned said policy to the plaintiff, who accepted the same.

"5. Thereafter the plaintiff paid the interest on said outstanding premium notes, annually, in advance, until the year 1876, when he ceased to pay the same, and has not since paid the same.

"6. Said policy provided that if the assured should not pay the interest annually in advance, on any outstanding premium notes given for any portion of the annual premiums on said policy, then said policy should cease and determine, and said company should not be liable for the payment of the sum insured or any part thereof.

"7. By reason of the failure and neglect of the plaintiff to pay the interest annually, in advance, on said outstanding premium notes in the year 1876 and thereafter, said policy of insurance has ceased and determined, and the defendant is not liable for the payment of the sum insured, or any part thereof."

The plaintiff's reply was as follows: "The plaintiff demurs to the answer of the defendant, as the facts therein stated are insufficient in the law, because the paid-up policy upon which

complaint is brought was non-forfeiting by its terms, and contained no provision that the failure to pay interest on the outstanding premium notes should work a forfeiture of said paid-up policy, and the same is nowhere averred in said answer."

The special ground of this demurrer presents the precise question involved in the case, namely: Does the paid-up policy contain a provision that the failure to pay interest on the outstanding premium notes shall work a forfeiture of the policy?

This question is different from the one considerably discussed in other jurisdictions, namely: What will entitle the insured to a paid-up policy, and what provisions as to forfeiture should it contain? The parties have settled these questions themselves by giving and accepting the reduced insurance; and if the policy thus accepted contains a provision whereby the failure to pay interest will make it void, then the plaintiff by his pleadings impliedly admits that he has no case, even though he would have been entitled to a different policy under the original contract.

The new contract, whereby the insurance was reduced to two hundred dollars, states that the company recognize the policy binding for that sum, "subject to the terms and conditions expressed in this policy and in the quitclaim to this company bearing even date with this entry." This, in effect, is the same thing as a new policy, containing the terms and conditions of the old one as far as applicable. Now, among these conditions is the clear stipulation that "if the assured shall not pay the interest annually, in advance, on any outstanding premium notes, this policy shall cease and determine." In what manner did this provision become eliminated from the paid-up policy?

It cannot be claimed to be inapplicable, because there is a subsisting obligation to pay this interest annually in advance, recognized not only in the original policy but in the quitclaim, whereby the plaintiff and his wife, when they applied for the reduced insurance, made a fresh promise and agreement to pay this interest, and this quitclaim is referred to and made part of the new contract, and the promise on the part of the company is made subject to it as a condition.

But a specious argument always urged against this view by counsel for the insured and sometimes sanctioned by courts is founded upon what is called the absurd paradox of forfeiting

a non-forfeitable policy. The name "non-forfeiting" has undoubtedly been sometimes used to mislead applicants for insurance, and some of the cases refer to the fact that agents for insurance companies have made declarations and issued circulars to the effect that, after the payment of two annual premiums, the policy would be binding on the company without any further attention on the part of the holder.

But no such fact appears in this case, and upon the admitted facts it is certain that the insured was not misled, for he voluntarily offered to pay and did actually pay interest annually in advance on the paid-up policy until the year 1876. It is manifest that both parties at the time, and for several years subsequently, construed the contract alike. There was no trap, therefore, into which the plaintiff was unwarily led.

But courts need not be misled by mere appeals to prejudice. The contract is not to be construed by its mere label, but by its written terms, and upon referring to these we see at once that the policy is non-forfeitable only to a very limited extent.

No one has ever claimed that it extends beyond the payment of an annual premium and interest, and even in these respects it is non-forfeitable only at the option of the holder, who must transmit the policy to the company and make application for its conversion into a paid-up policy within one year after default. But a glance at the policy will show that even after the conversion the insured can have no security against forfeiture except by observing the conditions. If without the consent of the company he travels outside of the prescribed limits mentioned, if he engages in certain specified hazardous occupations, if he becomes intemperate or is addicted to vice of any kind to the extent of permanent impairment of his health, if he is convicted of felony, if he dies by his own voluntary act or in consequence of a duel or under the sentence of the law, the paid-up, non-forfeitable policy could not for a moment avail, but would thereby become null and void.

Any argument, therefore, founded merely upon the use of the term "non-forfeitable" is of little weight. We must, as in all other cases, construe the contract by the language used in it. In this case the question is confined to the language of the saving clause, which is the fourth. Does that save the insured from the consequences of a failure to pay interest, the same as it does in the case of failure to pay future annual

premiums? The third clause, which it is indispensable to consider in this connection, clearly specifies two distinct defaults, either of which will forfeit the policy: 1. Failure to pay the annual premiums when due; and 2. Failure to pay interest in advance on outstanding premium notes. So far the meaning cannot be mistaken. Now how does the saving clause which follows affect the question? It only relieves the insured (after the payment of two or more annual premiums) from one of those defaults,—“the payment of any subsequent premium when due.” Not a word is said about interest. The saving clause, therefore, is not co-extensive in its operation with the preceding forfeiture clause, as it should be to justify the plaintiff’s construction. It is not easy to conceive why the parties, having clearly in mind the distinction between the two causes of forfeiture mentioned in the third clause, should in the next, in terms, confine the relief to one only, if they intended to place both on the same ground. To accept the plaintiff’s view would be for the court virtually to insert what the parties omitted. If it be suggested that the distinction between interest and premium note was unnecessary, the answer is twofold. In the first place, the parties have made such a distinction, and presumably had it in mind all through; and in the second place, the distinction is well founded, for the interest contract is not a mere incident of the note, but distinct from it; it is payable in advance at the beginning of each year, without reference to the time when the notes become due. And herein is a distinction of some importance between the case at bar and some of the cases from other jurisdictions, where the premium note was payable at a future day with interest without separate contract as to the latter. In such case the interest, being a mere incident of the note, could not be separately recovered, and there would be some reason for holding that if the note was to be paid only by deducting it from the policy upon its final adjustment, the interest also must follow the same course, for it must follow the note.

But is the distinction, which we have assumed that the policy in question makes, reasonable and just? The requirement to pay interest annually is indispensable to the success of this system of insurance where credit is given. The annual premium for the risk here was \$108.72. The policy was a participating one, under which the insured was to receive his fair *proportion of dividends*. The company could not treat this *matter as entirely isolated from all other policies*. Some

stable basis must be found upon which an intelligent estimate could be made of the company's ability to pay losses, expenses, and dividends. Such basis can only be found in the assumption that the company will certainly receive the annual premium in money, or a fair equivalent in the way of annual interest. The reception of the note, payable at a future day, cannot possibly be the same thing as payment in money, unless interest is paid on the credit annually. The relief from forfeiture, provided for in the policy, is based upon the equitable idea that the reduced policy represents the proportionate amount of insurance fully paid for upon a cash basis. If the insured wishes to be secure from forfeiture, he may pay the annual premiums in money. If he insists on a credit, he may take a reduced policy, which exempts him from the payment of future annual premiums; but he is still subject to the rigorous condition to pay interest, or lose the benefit of his policy.

In support of these views, we cite sundry cases from other jurisdictions.

The case of *Knickerbocker Life Ins. Co. v. Dietz*, 52 Md. 16, decided in April, 1879, is very strong for the defendant. The original policy, in substance, was the same in every respect as the one under consideration. It was dated May 5, 1868, and under it the insured paid premiums in cash and notes up to May 5, 1873, when he surrendered the policy, and obtained a new one for five tenths of the amount originally insured. The second policy stated that it was issued in consideration of the surrender of the previous one, and accepted by the insured upon the express condition and agreement that if the interest should not be paid on or before the day named, the policy should be null and void. The interest was not paid on the 5th of May, 1874, and the policy was canceled by the company. Soon after this the insured tendered the interest due; but the company refused to receive it.

The questions arose under a bill in equity, alleging that no interest was required to be paid May 5th; that the clause that made the new policy void on non-payment of interest was inconsistent with the true meaning of the contract; that the stipulation as to forfeiture was in the nature of a penalty, against which a court of equity should relieve, and praying for such construction of the contract, and for a decree for the payment of the amount of the policy less the notes and interest. It will be seen that the position of the case before a court

of equity was more favorable for the claimant than that of the present case; but the court held there was no relief. Grason, J., in delivering the opinion of the court, said: "The theory on which the amount of the premium is fixed . . . is that, assuming that a man of a given age has a prospect of living a certain number of years, as shown by experience and observation, the premium charged is such a sum as, invested annually at a certain rate of interest and compounded, will, at the expiration of that time, amount to enough to pay the policy and cover the expense of the company. To accomplish this result, the premium must be punctually paid and invested, and the interest reinvested at the assumed rate. Otherwise, the ability of the company to pay the policy, instead of being a matter of reasonable certainty, becomes a mere matter of chance, the business of life insurance ceases to have any scientific or accurate basis, and a policy of insurance becomes a mere wager on the life of its holder. The prompt payment of interest on premium notes is as necessary to the successful working of an insurance company, as well as to the security of the insured, as are the payment of the premium notes themselves. If one policy-holder can fail to pay his interest, any number of them may do the same, and the ruin of the company would be the inevitable result. The time for the payment of interest on premium notes is of the essence of contracts of insurance."

The case of *Knickerbocker Ins. Co. v. Harlan*, 56 Miss. 512, decided in January, 1879, was an action on a paid-up policy, which recited that it was issued in consideration of the surrender of the original policy (the provisions of which were similar to those in the case at bar), and which stipulated that if the interest on the premium note was not paid before a specified day, the policy should be null and void. The company pleaded the forfeiture of the paid-up policy by reason of the non-payment of interest; to which plea the plaintiff demurred, precisely as in the case at bar. The court below sustained the demurrer upon precisely the same arguments as are urged in behalf of the plaintiff in the present case, but the judgment was reversed in the supreme court, mainly upon the ground that, under a proper construction of the new policy, the right to recover the sum assured by it was to be earned only by the prompt payment in future of the interest on the premium note, and that it made no difference that the amount of the note was already due the company on the old policy.

In *Alabama Gold Life Ins. Co. v. Thomas*, 74 Ala. 578, decided in December, 1883, the action was upon a paid-up policy, as contained in an indorsement upon the original policy, the terms of which were as follows: "In consideration of the payment on the within policy of four annual premiums, less note for \$169.20, given for balance due on premium loans to November 11, 1872, said policy is entitled at maturity to a paid-up value of four tenths of the sum insured, subject to deducting note above described, interest upon which is payable annually in advance." It was held that the indorsement was to be construed, together with the original policy, as constituting one contract, and that thereby the parties made a clear agreement that the policy should be void in the event of the failure to pay interest. It was held, as in the Maryland case before cited, that "the payment of interest was of the essence of the contract; that the calculations of insurance actuaries fixing the rates of insurance are based on the theory of prompt payment, so as to afford opportunity for such reinvestment as to reap the fruits of compound interest upon the company's moneyed capital."

Insurance Co. v. Robinson, 40 Ohio St. 270, was an action based on the refusal of the company to grant an application for a paid-up policy pursuant to the provisions of a policy containing provisions identical with the one at bar, so that this case presents the question as to the rights of the parties under a non-forfeiting policy like the one in this case prior to the indorsement made upon it. The default on the part of the insured was simply as to interest on the premium notes. He had paid previously four annual premiums, part in cash and part by note, in the manner provided. Granger, C. J., in delivering the opinion of the court, said: "The third condition before us is plain. It clearly states that upon a failure to pay the interest in advance, the policy should be void. The fifth adds, that in such case, all payments thereon, and all dividends and credits accruing therefrom, shall be forfeited to the company. But the insured claims that the fourth condition modifies the third. This fourth condition makes no reference to interest, either expressly or by reasonable implication. Having failed to pay the interest due on four notes, he in effect was in default for a part of each of four annual premiums, besides the one that became due on March 7, 1876. This interest formed no part of the annual premium due on that day. Its punctual payment was necessary to complete

the payment of the premiums due in the four preceding years. . . . We are unwilling to so construe a stipulation worded so plainly, and with such evident care, as to make of no moment a default which the third condition declared of enough importance to destroy the life of the policy."

In *Attorney-General v. North American Life Ins. Co.*, 82 N. Y. 172, decided in September, 1880, the question arose in reviewing the decision of a referee appointed to adjust the claims against an insolvent life insurance company in the hands of a receiver. It appeared that in lieu of certain policies upon which notes had been given for part payment of annual premiums, paid-up policies had been issued containing a provision that, in case the interest should not be paid as agreed, the policies should become void. Where there was such default in the payment of interest, the referee rejected the claims, and the court of appeals unanimously sustained the ruling. Earl, J., in delivering the opinion, in answer to the claim that the condition relied upon by the insurance company was unconscionable, and that a case of forfeiture was presented against which a court of equity should relieve, said, among other things: "It was a contract between the parties that these policies should be carried only so long as interest should be promptly paid upon the notes; and if not paid, that the company should cease to be liable. . . . The provision is not an unusual one. . . . Here was an insurance company doing business throughout the country. Prompt payment of its obligations was deemed important to it. If premiums to such an insurance company are not promptly paid, it may be agreed that the policy may be forfeited. If notes be taken for premiums, payable at a definite time, the policy may be avoided for non-payment. If notes be taken which are to run to the maturity of the policy and then be adjusted, the policy may be avoided for non-payment of the interest. All these cases stand upon the same footing, and a court of equity can, upon principle, no more relieve against a forfeiture in one of them than in either of the others. The case of the claimants may be treated as if the interest represented premiums to be paid during the running of the policies. . . . There is much authority sustaining the decision of the referee: *Anderson v. St. Louis Mut. Life Ins. Co.*, 5 Bigelow's Ins. Cas. 527; *Martin v. Aetna Life Ins. Co.*, 5 Id. 514; *Patch Phoenix Mut. Life Ins. Co.*, 44 Vt. 481; *Knickerbocker Life Ins. v. Harlan*, 8 Ins. Law J. 349; *Nettleton v. St. Louis Life Ins.*

Co., 6 Id. 426; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 742."

Patch and Wife v. Phoenix Mut. Life Ins. Co., 44 Vt. 481, decided in 1872, was an action of *assumpsit* upon a paid-up policy issued in exchange for an endowment policy upon which two annual premiums had been paid, partly by two notes. The exchange was made pursuant to a memorandum on the back of the first policy, to the effect that the company would purchase any of its policies upon which two annual premiums had been paid, and issue a new policy for the equitable value of the policy surrendered, "thus making all policies non-forfeitable." On the margin of the paid-up policy was this statement: "This policy is conditional on the interest on two notes given in part payment for two premiums paid on No. 10,603, being paid in advance." Pierpont, C. J., in delivering the opinion, among other things, said: "The interest upon the notes, by their terms, is to be paid annually, and it is such interest that the memorandum refers to and requires to be paid in advance. Any other construction would be a manifest violation of the meaning and intent of the parties to this contract. The defendant having taken the notes in the place of the money, it could not reasonably be expected that the defendant would do less than to secure the payment of the interest thereon, by making the new policy dependent upon its payment. Treating the memorandum as a part of the policy, and the whole to be considered the same as though it was included in the body of the instrument, the interest upon the notes becomes practically a premium upon the policy, payable annually in advance; and on failure to pay the same, the company ceases to be liable, and the policy is forfeited."

Russum v. St. Louis Mut. Life Ins. Co., 1 Mo. App. 228, decided February 28, 1876, was an action on the original policy, conditioned,—1. That default in the payment of future annual premiums should not avoid, but it should be proportionately reduced; 2. That if the insured should fail to pay annually in advance the interest on premium notes the policy should be void. Gant, P. J., in delivering the opinion of the court, said: "If the insured had paid the interest on his note on December 2, 1871, he would, we think, have been entitled to recover two tenths of the sum insured, deducting the unpaid note. Having failed to make that payment, the policy is forfeited and the company discharged. We think it impossible to

escape this conclusion. . . . It is urged that the two provisions of this policy are inconsistent and contradictory, and that the one which leads to a forfeiture must be rejected; but the clauses are not inconsistent. . . . All that is needed is for the insured to bring himself within the terms of both. The first is intended to save a forfeiture, which generally would be incurred by the failure to pay the annual premium. To this extent it is a privilege or advantage to the assured. The second proviso insists upon rigorous conditions,—in respect of what? Only of so much of any unpaid premium as the assured, instead of paying in cash, takes the indulgence of only paying interest on at six per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy; he can presently pay his note for the premium, and without more, he has a paid-up, non-forfeitable policy for a fixed portion of the sum contemplated by the instrument when originally issued. If he wishes instead of this to take the chances of gain, he must at the same time incur the hazard of loss, and cannot complain if he be held to the terms of the contract he has deliberately made.”

Other pertinent cases might be cited, but these will suffice to show that the views of the majority of this court have a very strong support in other jurisdictions; and while we concede that the opposing views of the plaintiff are sustained by some courts entitled to very great respect, we think the weight of judicial authority is the other way.

The first case cited in behalf of the plaintiff, to which we will refer, is *Fithian v. North Western Life Ins. Co.*, 4 Mo. App. 386, decided October 23, 1877, by the same court that decided *Russum v. St. Louis Mut. Fire Ins. Co.*, *supra*, the year previous. It was held that non-payment of interest did not forfeit the policy in that case, and some of the reasoning at first blush seems different from that in the first case; but Lewis, J., who delivered the opinion, concurred in the previous one, and no allusion whatever is made to the other case. It would seem improbable that it was the intention of the court to overrule the first case, or that it was considered inconsistent with the last one, and upon examination of the policy we see good ground for a distinction. The first stipulation was, that in case of default the company would pay as many tenths of the original sum as there should have been complete annual premiums paid; then followed the provision,—“If said pre-

miums, or the interest upon any note given for premiums, shall not be paid on, etc., . . . then in every such case the company shall not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above." Here both notes and interest are put on the same ground, showing that no distinction was intended, and the company in terms is made liable as stipulated,—that is, for so many tenths of the original sum insured; and there were other provisions in the policy adverted to in the opinion showing that no forfeiture was to arise because of any default in payments, whether of notes or interest. This case, it will be seen, may therefore be widely distinguished from the one at bar, in that the policy in terms secures a proportionate part against forfeiture; while here, as we have seen, it is expressly forfeited for non-payment of interest, with no relief provided.

The same distinction may also be made in regard to the cases of *Hull v. Northwestern Mut. Life Ins. Co.*, 39 Wis. 406; *Northwestern Mut. Life Ins. Co. v. Little*, 56 Ind. 504; *Ohde v. Northwestern Life Ins. Co.*, 40 Iowa, 357; *Symonds v. Northwestern Life Ins. Co.*, 23 Minn. 491; *Northwestern Mut. Life Ins. Co. v. Ross*, 63 Ga. 199; and *Northwestern Mut. Life Ins. Co. v. Bonner*, 36 Ohio St. 51. In all these cases the policies were the same as in the case cited from 4 Mo. App., *supra*.

Of all the cases therefore cited in behalf of the plaintiff, only two remain which are weighty in the opposing scale. The first and the stronger case is that of *Cowles v. Continental Life Ins. Co.* (the present defendant), decided July 31, 1855, by the supreme court of New Hampshire, where the action was *assumpsit* on a paid-up policy identical in its provisions with the one now in suit, and where the defense was the same. It is, therefore, irreconcilably in conflict with the positions we have taken.

In the brief but forcible opinion delivered by Doe, C. J., there is no reference to the authorities. The basis upon which the reasoning rests will fully appear from the following quotation: "A significant clause of the contract is a conspicuous marginal advertisement describing the writing as a 'non-forfeitable endowment policy.' The forfeiture clause qualified by the provision for a 'paid-up' policy does not mean that the reduced 'paid-up,' 'non-forfeiture' insurance is annually forfeitable for non-payment. The strict construction for which the defendant contends would leave the insured exposed to a danger from which the reduction and conversion of the policy

would be generally understood to relieve him; and it is not to be presumed that the document was ingeniously drawn up for the purpose of fraudulently obtaining money by non-forfeiture pretenses. All parts of the contract taken together can be, and should be, reasonably and liberally understood as designed to accomplish the scheme of non-forfeiture for non-payment, which men in general would believe the policy invited them to accept."

The other case is *Bruce v. Continental Life Ins. Co.*, 58 Vt. 253, decided February 26, 1886, by the supreme court of Vermont, and reported in the Eastern Reporter, vol. 4, No. 6, p. 452. This was a bill in chancery to compel the delivery of a paid-up policy, and payment of the amount due. The court gave the same construction to the original policy as was given in the New Hampshire case, but certain circulars issued by the company, and the fact found in the case that the company regarded the premium notes as given for a loan of money, seem to have been influential with the court.

This case, however, recognizes a distinction already adverted to, and which we think applicable to the case now under consideration. Powers, J., in giving the opinion, said: "The case at bar is unlike *Patch v. Phœnix etc. Ins. Co.*, 44 Vt. 481. There the question arose upon the construction of a paid-up policy, issued in place of a former one surrendered, which contained an express stipulation that certain sums of interest should be paid in advance. The action was *assumpsit* on the paid-up policy, and no question was made whether the paid-up policy was in such form as the insured was entitled to. Such as it was he accepted it, and the action was upon it in the form it was issued and accepted."

It is manifest that our argument in some particulars has gone beyond the strict requirements of the present case, and has tended in some measure to show that the form of paid-up policy issued to the plaintiff, and accepted by him, was in accordance with the original policy; but in view of the adverse construction of the same kind of policy by the courts of New Hampshire and Vermont, and the want of unanimity among the members of this court upon this subject, we think it best to leave that part of the discussion an open question for future consideration should the matter again arise, and to restrict the present decision to the precise question stated at the opening of our discussion, whether the paid-up policy involved in this

suit contains a provision whereby the failure to pay interest has accomplished the forfeiture of the policy.

We advise that the answer of the defendant to the complaint is sufficient.

PARK, C. J., and PARDEE, J., concurred.

CARPENTER and GRANGER, JJ., dissented.

WAIVER BY INSURANCE COMPANY OF CONDITION RESPECTING PAYMENT OF PREMIUM NOTE: See *Hodsdon v. Guardian L. Ins. Co.*, 93 Am. Dec. 73, and note 75; *Wearvin v. Universal L. Ins. Co.*, 39 Am. Rep. 657; *Alexander v. Insurance Co.*, 58 Id. 869; *Murphy v. Southern L. Ins. Co.*, 27 Id. 761; *Mutual L. Ins. Co. v. French*, 27 Id. 443; *Pomeroy v. Insurance etc. Co.*, 59 Id. 144; *Cotton States L. Ins. Co. v. Lester*, 35 Id. 122; *Prentice v. Knickerbocker L. Ins. Co.*, 33 Id. 651; *Viele v. Germania Ins. Co.*, 96 Am. Dec. 83.

INSURANCE COMPANY IS ESTOPPED TO INSIST ON FORFEITURE FOR DELAY IN PAYMENT OF PREMIUMS, if its course of conduct had led the insurer to believe that the premiums would be received after the appointed day: *Appleton v. Phoenix etc. Ins. Co.*, 47 Am. Rep. 220; *Helms v. Philadelphia Ins. Co.*, 100 Am. Dec. 621; and see *Lyons v. Insurance Co.*, 54 Am. Rep. 354.

POLICY FORFEITED BY NON-PAYMENT OF PREMIUM IS NOT REINSTATED by mere demand of payment of the premium: *Cohen v. Continental Fire Ins. Co.*, 60 Am. Rep. 24.

McFARLAND v. SIKES.

[54 CONNECTICUT, 250.]

RULE THAT PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT OR VARY WRITTEN CONTRACT applies only to a written contract which is in force as a binding obligation.

WRITTEN CONTRACT MAY BE DELIVERED UPON CONDITION, but it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.

POSSESSION OF NOTE BY PAYEE IS PRIMA FACIE EVIDENCE THAT IT HAD BEEN DELIVERED, but the fact may be shown to be otherwise by parol evidence. Such evidence does not contradict the note, or seek to vary its terms, but merely goes to the point of its non-delivery.

PAROL EVIDENCE IS ADMISSIBLE, IN ACTION ON PROMISSORY NOTE, to show that it was delivered by the defendant to the plaintiff on condition that it should be returned to the defendant on a certain day, if demanded, and that it was so demanded, but the plaintiff refused to surrender it.

ACTION on a promissory note. The opinion states the case.

C. H. Briscoe, J. P. Andrews, and D. Marcy, for the appellant.

J. L. Hunter and B. H. Bill, for the appellee.

By Court, PARK, C. J. This is a suit upon a note of three hundred dollars. On the trial in the court below the defendant offered evidence to prove, and claimed to have proved, that previously to the execution and delivery of the note the plaintiff, who was a grand juror of the town of Ellington, where the defendant resided, and was acting as the attorney of one Mary Quinn, accused the defendant of having made an assault upon the person of the said Mary, and threatened him with a criminal prosecution unless he settled with her for the injury; that the defendant thereupon admitted that he had done wrong in the matter, and offered one hundred dollars to settle it; that the plaintiff demanded three hundred dollars, which the defendant was unwilling to pay; that the defendant was without counsel, and asked to be allowed till the following Tuesday to consider the matter, and offered to give his note for three hundred dollars, to be held by the plaintiff till then, and if he did not then appear, to be held by the plaintiff as a settlement for the injury to the said Mary, but if he should appear, to be returned to him to be canceled; that thereupon the plaintiff wrote the note in suit, which the defendant executed and delivered to the plaintiff, to be held by him upon the conditions stated; and that the defendant at the same time declared that he should appear and demand a return of the note. The defendant also offered evidence that on the following Tuesday he appeared before the parties and demanded the return of the note, but that the plaintiff refused to surrender it.

With reference to this evidence, the defendant requested the court to charge the jury "that if the note was delivered to the plaintiff with the understanding between him and the defendant that it was to be delivered up to the latter on his demand on the Tuesday following, and the defendant demanded its return on that day, the plaintiff cannot recover, and the verdict must be for the defendant." The court did not so charge the jury, but substantially that if they should find all the facts claimed by the defendant to be proved, they did not constitute a defense to the action.

We think the court erred in refusing to charge as requested, and in charging as it did. The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract.

A written contract must be in force as a binding obligation to make it subject to this rule. Such a contract cannot be

come a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise, and by parol evidence.

Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note, in its terms, is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them.

In the case of *Benton v. Martin*, 52 N. Y. 570, the court say: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexation of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all; and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which the delivery is made."

In the case of *Schindler v. Muhlheiser*, 45 Conn. 153, the head-note is as follows: "The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. Held, in a suit on the note, that parol evidence was admissible, on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid."

The defense in that case was really that the note had never been delivered as a note binding upon the defendant. The delivery was merely formal, and was so understood by the parties. See also *Adams v. Gray*, 8 Conn. 11; 20 Am. Dec. 82; *Collins v. Tillou*, 26 Conn. 368; 68 Am. Dec. 398; *Clarke v. Tappin*, 32 Conn. 56; *Post v. Gilbert*, 44 Id. 9; *Hubbard v. Ensign*, 46 Id. 585.

We think the court erred in refusing to charge the jury as requested by the defendant.

The view we have taken of this question renders it unnecessary to consider the other questions made in the case.

There is error in the judgment appealed from, and it is reversed, and a new trial ordered.

ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN WRITTEN INSTRUMENT: See *Blossom v. Griffin*, 67 Am. Dec. 75, and note 80; *Cobb v. Wallace*, 98 Id. 435, and note 441; *Keller v. Webb*, 28 Am. Rep. 209; *Hatch v. Douglas*, 40 Id. 154; generally such evidence is inadmissible to contradict or vary the terms of a written contract: *Id.*; *Shaw v. Shaw*, 79 Am. Dec. 605, and note 606; *McKim v. Aulbach*, 39 Am. Rep. 470; *Allen v. Rundie*, 47 Id. 599; *Martin v. Lewis*, 32 Id. 682; parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement without recourse: *Doolittle v. Ferry*, 27 Id. 166; *Kern v. Von Phul*, 82 Am. Dec. 105; and where a contract is to be performed "immediately," such evidence is inadmissible to excuse delay in the performance: *McDermott v. Railroad Co.*, 39 Am. Rep. 526.

PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH FACT COLLATERAL TO WRITTEN INSTRUMENT, which would control its effect and operation as a binding engagement: *Wedlinger v. Smith*, 40 Am. Rep. 727; and generally such evidence is admissible to explain ambiguity, or to apply the terms of the contract to the subject-matter: *Stoops v. Smith*, 97 Am. Dec. 76, and note 80.

TO SHOW PARTIAL FAILURE OF CONSIDERATION OF PROMISSORY NOTE AS DEFENSE, parol evidence of what took place at the time the note was made is admissible: *Peterson v. Johnson*, 94 Am. Dec. 581.

PAROL EVIDENCE OF AGREEMENT BETWEEN PAYEE AND DRAWER, that the drawer of a bill was not to be liable; is inadmissible: *Cummings v. Kent*, 58 Am. Rep. 796.

PROMISSORY NOTE MAY BE DELIVERED AS ESCROW, to take effect upon the happening of a certain event, to be proved by parol, but such proof must not go to the extent of varying the terms of a note absolute on its face: *Foy v. Blackstone*, 83 Am. Dec. 246, and see note 248.

TOBEY v. HAKES.

[54 CONNECTICUT, 274.]

WRIT OF MANDAMUS IS NOT REGARDED AS APPROPRIATE REMEDY for the enforcement of contract rights of a private and personal nature, and obligations which rest wholly upon contract, involving no questions of public trust or official duty. And the writ will not ordinarily issue if the applicant has other adequate remedies.

MANDAMUS WILL NOT LIE TO COMPEL SECRETARY OF PRIVATE CORPORATION TO ALLOW the transfer of stock on the books of the corporation.

MANDAMUS. The facts appear in the opinion.

H. E. Pardee, for the appellant.

T. M. Maltbie, for the defendant.

By Court, CARPENTER, J. This is an application for a *mandamus* to compel the secretary of the Utica Cement Manufacturing Company, a private corporation, to allow the plaintiff to transfer stock on the books of the company to a purchaser, and to issue a certificate therefor. The superior court denied the application, and the plaintiff appealed.

Regularly, the writ of *mandamus* lies against a public officer to compel the performance of a public duty: *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112. Hosmer, C. J., says in that case: "It never lies to restore to a private office, or to execute a private right." It being a prerogative writ, there can be no doubt that at common law it was thus limited. In *Fuller v. Plainfield Academic School*, 6 Conn. 532, the writ was held to lie against an incorporated school,—“a corporation established by the supreme power of the state for public and beneficial purposes.” The question we are now considering was not made in that case. It was claimed that the defendant was an eleemosynary corporation of private endowment, and that the court had no power to review the action of the trustees. But it was held that, being a corporation with a special charter from the general assembly, it was controllable by the laws of the land, to be administered by competent tribunals. It seems to have been tacitly conceded that the object of the corporation was for the public good, and that the office of trustee was of a public nature. In *Duane v. McDonald*, 41 Conn. 517, this court said: “We see no necessity for extending the common-law remedy of *mandamus* beyond its original and well-established limits.” In *Parrott v. City of Bridgeport*, 34 Id. 180, 26 Am. Rep. 439, it again said: “But the writ of *mandamus* has never been considered as an appropriate remedy for the enforcement of contract rights of a private and personal nature, and obligations which rest wholly upon contract, and which involve no questions of public trust or official duty.”

This suit is against a private corporation, and its object is to enforce a mere private right. It is in no sense a proceeding to enforce the performance of a public duty. We have no precedent in this state for allowing this writ to compel the transfer of stock in a private corporation, and the authorities elsewhere are against it: *Cushman v. Thayer Mfg. J. Co.*, 76 N. Y. 365; 32 Am. Rep. 315; *Townes v. Nichols*, 73 Me. 515; *State v. People's Building etc. Association*, 43 N. J. L. 389; *Bank etc. v. Harrison*, 66 Ga. 696.

There is another ground on which the writ was properly refused. It is familiar law that the writ will not ordinarily issue if the plaintiff has other remedies. If the corporation improperly refuses to transfer the stock, it is clearly liable for the damages in an action at law. If that remedy is not adequate, or if for any reason he is entitled to the specific stock purchased, a court of equity will entertain jurisdiction, and grant relief.

There is no error in the judgment complained of.

MANDAMUS, WHEN IT DOES AND WHEN IT DOES NOT LIE: See *Weeden v. Town Council*, 98 Am. Dec. 373, and note 375; *Pumphrey v. Mayor etc.*, 28 Am. Rep. 446; *Vicksburg etc. R. R. Co. v. Lowry*, 48 Id. 76; *State v. Stevens*, 33 Id. 175; will not lie against the governor: *Jonesboro etc. Turnp. Co. v. Brown*, 35 Id. 713; *Mauran v. Smith*, 5 Id. 564; is not the remedy in case of doubtful right: *People v. Johnson*, 39 Id. 63; and writ of, will not issue if there exists a plain and adequate remedy in the ordinary course of law: *State v. McCrillis*, 96 Am. Dec. 169, and note 171.

IN CASE OF PRIVATE CORPORATION, MANDAMUS MAY ISSUE on its petition against persons claiming to hold its offices: *American R'y etc. Co. v. Hara*, 3 Am. Rep. 377; but does not lie to compel the transfer of stock by a private corporation to a purchaser: *Freon v. Carriage Co.*, 51 Id. 794, and note 798.

MANDAMUS LIES TO COMPEL CUSTODIAN OF EXCISE BONDS TO ALLOW a citizen interested in inspecting them to have access to them: *Brown v. County Treasurer*, 52 Am. Rep. 800; and where a railway company attempts to discriminate against one by refusing to sell him commutation tickets at the same rate that it sells them to the public generally, the sale may be enforced by *mandamus*: *State v. Delaware etc. R. R. Co.*, 57 Id. 543; and a stockholder in a private corporation may have *mandamus* to compel the production of its books and papers to enable him to ascertain and secure his rights: *Commonwealth v. Phoenix Iron Co.*, 51 Id. 184.

APPROVAL OF OFFICIAL BOND IS JUDICIAL AND NOT MINISTERIAL DUTY, and is not compellable by *mandamus*: *Ex parte Harris*, 23 Am. Rep. 559.

SHERWOOD v. WHITING.

[54 CONNECTICUT, 330.]

ERRONEOUS MENTION OF INCIDENT IN HISTORY OF TITLE TO PIECE OF LAND IS WITHOUT FORCE as against the mention of metes, bounds, courses, distances, and visible monuments, when the question is, whether the deed is sufficient, as to form, to convey the land intended.

COURTS SHOULD UPHOLD RATHER THAN DESTROY DEEDS; and in the discharge of their duty in this respect, errors in description are frequently declared to be of no effect.

DEED—CONSTRUCTION AND EFFECT.—The property intended to be conveyed was described as follows: "All the real estate of O. S., deceased, which was distributed to F. S. in the distribution of said estate, and

afterwards conveyed to me by said F. S." In point of fact, F. S. had conveyed to the grantor before the distribution, and not after, and for the purpose of concealing the property from his creditors; but his deed fully described the land conveyed. In a suit to compel the heirs of the grantor to execute a corrected deed, *held*, that it needed no correction; if legally sufficient in form, such deed conveys a title which is unassailable; and for the purpose of determining its sufficiency in form, the only tests to be applied are those which would be applied to a deed executed upon a valuable consideration.

SUIT for reformation of a deed. The opinion states the case.

J. C. Chamberlain, for the plaintiffs.

H. J. Curtis and J. A. Joyce, for the defendants.

By Court, PARDEE, J. In 1848, Oran Sherwood, of Fairfield, died intestate, leaving real estate, a widow, and four children. Of these last was Franklin Sherwood, the plaintiff. On March 1, 1856, he conveyed his undistributed interest in his father's estate to his mother, saying in his deed that he intended "to convey my entire undivided title and interest in and to all the estate of my father, the said Oran Sherwood, late deceased, within said tract of land, as heir at law of my said father therein." This conveyance was made for the purpose of concealing the property from his creditors. On June 16, 1856, distribution was made. On February 19, 1883, his mother, desiring and intending to reconvey to him precisely what he had conveyed to her, executed and delivered a deed to his wife, for his benefit, in which she described the property as follows: "All the real estate of Oran Sherwood, deceased, which was distributed to Franklin Sherwood in the distribution of said estate, and afterwards conveyed to me by said Franklin Sherwood by sundry deeds, as recorded in Fairfield land records." In point of fact, Franklin Sherwood had conveyed to her before, not after, distribution. Mrs. Sherwood, the grantor, is dead. Franklin Sherwood asks, in effect, that her heirs at law may be compelled to execute a corrected deed. They resist, and insist that inasmuch as he conveyed the land to his mother for a fraudulent purpose, equity will leave him where he placed himself. If we should concede that if Mrs. Sherwood had refused to reconvey the land to her son the court would not come to his relief, this case would not be disposed of. She made a conveyance; if that is legally sufficient in form, the plaintiff's title is unassailable; and for the purpose of determining the question as to its sufficiency in form, the tests, and

only those, are to be applied which would be applied to a deed executed upon a valuable consideration. Every concession which would be made in behalf of the latter is to be made in behalf of the former. And if the deed had been made to a purchaser for full and valuable consideration, we think the heirs of the grantor could not obtain the assistance of any court in an effort to inherit both the consideration and the property. There is and can be no doubt or question as to the identity or location of the piece of land in which Franklin Sherwood had an interest. In his deed to his mother, he gave the boundaries and contents; he stated that there had been no distribution, plainly implying that there would be; such distribution was made and recorded; by this, his part was set to him by metes and bounds; and the mother, in her reconveyance, declares that she intends to restore to him precisely that which he conveyed to her, and refers to the recorded distribution, where it is described to a certainty in every particular. Having secured absolute certainty by giving metes and bounds and quantity, and naming visible monuments, by way of supererogation, the grantor undertakes to mention a certain event in the history of the title to that land, and mistakenly states that it occurred before the conveyance to herself, when, in fact, it occurred after. The mention affects no metes or bounds or monuments, no courses or distances; no doubt as to identity is raised. Every person reading it had either actual or constructive notice of the mistake in stating the order of those events, for both distribution and deed were upon the public records, and declared that order. There is no finding that any person has acquired any right or interest in or title to the premises by conveyance from either Oran Sherwood or his mother, or by adverse occupation, which conflicts with the plaintiff's claim of ownership. As a matter of law, as a rule of construction this needless and erroneous mention of an incident in the history of the title to a piece of land is to be held to have no force as against the mention of metes, bounds, courses, distances, and visible monuments, when the question is, whether the deed is sufficient, as to form, to convey the land intended.

It is the duty of courts to uphold rather than to destroy deeds. It is the fundamental canon of interpretation of contracts to discover and give effect to the intention of the parties. In the case before us, the finding makes it certain that the mother intended to reconvey to her son precisely that interest

in his father's estate which he had conveyed to her before distribution. When a piece of land is so described that a surveyor's chain can be stretched along its boundaries with absolute certainty as to each course, distance, and monument, a transposition of dates, in stating previous conveyances constituting the chain of title, will not cloud or affect that certainty, nor destroy the operative force of a conveyance.

We cite a few of the many instances given in the reports where courts, in the discharge of their duty to find and carry out the intent, have declared that certain words of description in deeds are to be of no effect, which apparently are far more likely to give rise to a doubt as to identity than is the erroneous word in the deed before us. In *Worthington v. Hylyer*, 4 Mass. 196, the words of description are: "All that my farm of land in said Worthington on which I now dwell, being lot No. 17, in the first division." The land demanded in that action was not included in lot No. 17, yet the court held that it passed, the first being sufficient to ascertain the estate intended to be conveyed, and that the additional description inconsistent with the former was to be rejected, because, if it were to be considered as an essential part of the description, the deed would be void for repugnancy. In *Cate v. Thayer*, 3 Me. 71, the question was as to one of the lines of the town of Dresden, which was described as a course "north-northwest, including the whole of Gardiner's farm"; and the court held that the whole farm was included, although intersected by a line running north-northeast, because the farm was to be considered as a monument. In *Keith v. Reynolds*, 3 Id. 393, the description was: "A certain tract of land or farm in Winslow, including in the tract which was granted to Ez. Pattee," and afterwards there was added a particular description by courses and distances, which did not include the whole farm. It was contended that the particular description should prevail, in preference to the other, which was more general and uncertain; but it was decided that the first description was certain enough, and that it was to be adopted rather than the description by courses and distances, which was more liable to errors and mistakes. In *Lodge v. Lee*, 6 Cranch, 237, the description was: "All that tract or upper island of land called Eden"; and then it was added, "beginning at a maple tree," and describing the land conveyed by bounds, courses, and distances; but so as not to include all the island. The court held that the whole island passed. In *Jackson v. Barringer*, 15 Johns.

471, the grant was: "The farm on which J. J. D. now lives," which was bounded on three sides, and to contain eighty acres in one piece. The farm contained a hundred and forty-nine acres; and the decision was, that the whole farm passed. In *Swyft v. Eyres*, Cro. Car. 546, the land conveyed was described as "all the grantor's lands lying in Chesterton, viz., seventy-eight acres of land, with all profits, tithes, etc."; and then were added the words, "all which lately were in the occupation of Margaret Peto." It was found that the tithes of these glebe lands were never in the tenure of Margaret Peto, though other lands and tithes were. But it was held, notwithstanding, that the lands and tithes first described passed. In *Eliot v. Thatcher*, 2 Met. 44, note, the land conveyed was thus described: "All my real property, or homestead so called, lying and being in Dartmouth, together with about thirty acres of land, let the same be more or less; for more particular boundaries reference may be had to a deed given by Clark Ricketson to David Thatcher of the above-mentioned premises." It appeared that the grantor was seised only of a part of the land which he bought of Ricketson, but he had bought some land adjoining thereto, being in the whole about thirty acres, and it was decided that the whole passed; it being held that the word "homestead" was a sufficiently certain description, and that the grant ought not to be limited and restrained by the subsequent reference to Ricketson's deed, it being a well-known rule of construction of deeds that a precedent particular description shall not be impaired by a subsequent general description or reference, and that deeds are to be construed according to the intentions of parties; and that if there be any doubt or repugnancy in the words, such construction is to be made as is most strong against the grantor, because he is presumed to have had a valuable consideration for what he parts with.

In *Hastings v. Hastings*, 110 Mass. 280, A., the owner of a farm, conveyed in 1853 by deed "the farm on which I now live, and is the same which was deeded to me by J. G., March 15, 1810, reference being had to said deed." A lot of land which had formed part of the farm for forty years was not included in the deed of March 15, 1810, but had been conveyed to A. by J. G. by a deed dated January 11, 1810. It was held that this lot passed by the deed of A. In *Melvin v. Proprietors etc.*, 5 Met. 15, 38 Am. Dec. 334, the heirs of K. gave deeds to C. of land which they described as the "estate on which C. now lives," or the "estate called the C. farm," and

"being the same which was conveyed by M. to K. by deed" bearing a certain date; and it was shown that C., as lessee of K. and otherwise, had previously occupied the whole farm for many years. It was held that the deeds conveyed the right and title of the heirs to the whole farm, although the deed from M. to K., which was therein referred to, did not include the whole. The court says: "Another rule of construction is, that if the description be sufficient to ascertain the estate intended to be conveyed, it will pass; although some particular circumstance be added inconsistent with the description. . . . If the land had been conveyed by reference to known monuments and boundaries, it would be clear that a subsequent reference to the mortgage deed would not operate by way of restriction; and we think there is no good reason why the description in these deeds, the boundaries of the farm conveyed being certain and undoubtedly well known to the parties, should not be held equally conclusive." In *Deacons etc. v. Walker*, 124 Mass. 69, A mortgaged a "farm" known as the "T. place,"—"together with all the buildings thereon, including mills, water power, machinery, and fixtures belonging thereto,"—"being the same estate which was conveyed to me by B by her deed" duly recorded, "to which said deed and the record thereof reference is made for a description of said premises." The deed from B did not include a small parcel of land on which stood the only mill of A, with the connected buildings, but did include the dam and pond which furnished power to the mill. It was held that this parcel passed by the deed to A. The court said: "Reference is made to the Holden deed, not for the purpose of fixing the metes and bounds, as if describing the lot conveyed, but to show the grantor's chain of title." In *Andrews v. Pearson*, 68 Me. 19, in a conveyance of a "homestead farm," one of the parcels composing it was described as "twelve and a half acres out of lot numbered eight in the first range." It was held that the whole parcel passed, although it in fact contained twenty-five acres. The court said: "Freeman Allen was the owner of a farm of ancient and well-defined boundaries. He undertook to convey it to the plaintiff. He first described it as his 'homestead farm.' He then undertook to give a further description of it by naming the several parcels or portions of which it was composed. One of them is described as twelve and a half acres out of a lot numbered eight in the first range.

This portion of the farm, in fact, contained twenty-five acres. The question is, whether this mistake left half of this parcel unconveyed. We think not. We think it falls within the principle, *falsa demonstratio non nocet*; a mere false description in one particular, where enough remains to make it reasonably certain what premises were intended to be conveyed, will not defeat the conveyance." In *Union etc. v. Skinner*, 9 Mo. App. 189, it is held that "when one sells a lot by its number as laid out in a recorded plat, and in giving a further description misstates the boundary line thereof, the monument will prevail, and the further false description be rejected." In *Green Bay etc. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, a grantor by deed conveyed to the plaintiff and its successors and assigns forever, all his claim, right, title, and interest in or to a piece of land; in a subsequent clause he declares that the interest and title intended to be conveyed by the deed is only that acquired by virtue of a deed to him; this last conveyed to him only an undivided half. It was held that his whole interest passed. In *Wiley v. Lovely*, 46 Mich. 83, a deed described the land conveyed as lot seventy-seven of the original plat of the village as recorded; this plat contained only twenty-nine lots; another plat, unrecorded, designated the lot as seventy-eight; another unrecorded plat contained the lot, and it was shown that it had been held, taxed, and dealt with for more than twenty-five years as lot seventy-seven. It was held that the error in description did not invalidate the conveyance. In *Dwight v. Tyler*, 49 Mich. 614, it was held that "when a deed contains a wrong description, but the land can be identified by inquiry based on landmarks referred to, the title held by the grantor is not merely equitable but legal, and may be encumbered as such."

The superior court is advised that the deed to Mary A. Sherwood, one of the plaintiffs, in its present form, is effective to convey to her all of the right, title, and interest in the estate of Oran Sherwood which Franklin Sherwood conveyed to his mother, including the land upon which the right of dower rested. For that reason and for no other, that court is advised to dismiss the petition.

DEEDS ARE TO BE CONSTRUED ACCORDING TO INTENT OF PARTIES, and where the manifest intent appears, words which are repugnant to it are to be rejected: *Flagg v. Eames*, 94 Am. Dec. 363, and cases collected in note 369; *Graves v. Atwood*, 52 Am. Rep. 610.

DEED IS NOT VOID FOR UNCERTAINTY OF DESCRIPTION, if it can be made good by any construction: *Pursley v. Hayes*, 92 Am. Dec. 350; and see *Neyley v. Lindsay*, 5 Am. Rep. 427.

IN AGREEMENT FOR DEED OF LAND DESCRIBING IT BY NUMBERS AND DIMENSIONS, AND CONCLUDING, "known as the Cook and Clover block," the latter words controlled: *Lyman v. Gedney*, 55 Am. Rep. 871.

CREDIT COMPANY, LIMITED, v. HOWE MACHINE CO.

[54 CONNECTICUT, 357.]

DRAFTS ACCEPTED BY TREASURER OF CORPORATION ARE PRESUMED TO BE PROPERLY ACCEPTED by the corporation, there being no circumstances to indicate fraud or illegality; and in an action by the holder against the corporation as acceptor, the burden of proof is upon the defendant corporation to show that the plaintiff had knowledge that the acceptances were for accommodation, and that he was not a *bona fide* holder for value.

CORPORATION HAVING POWER TO DEAL IN MERCANTILE PAPER NECESSARY TO ITS BUSINESS IS BOUND by acceptances of accommodation paper by its treasurer, except as against those having notice that the paper was for accommodation.

BONA FIDE HOLDER FOR VALUE OF BILL OF EXCHANGE BEFORE ACCEPTANCE MAY ENFORCE IT against a subsequent acceptor, although no new consideration moves from him to the drawee. The rights of the holder of a bill of exchange are the same, whether they were acquired in anticipation of or subsequent to the acceptance.

PERSONS DEALING IN COMMERCIAL PAPER OF CORPORATION ARE BOUND TO TAKE NOTICE of the extent of its power, but are not required to have knowledge of the circumstances under which it is exercised. And especially is this so where the agent or officer of the corporation which exercises the power, at the same time represents the corporation, and speaks for it in giving information as to the circumstances.

PERSON DEALING WITH CORPORATION IS BOUND TO KNOW WHETHER OR NOT the officer or agent who represents it, and acts in its name, is authorized so to do. If he is, and the act is within the apparent scope of his authority, the dealer is not bound to have knowledge of extrinsic facts making it improper for him to act in that case.

ACTION upon four bills of exchange accepted by the treasurer of the defendant corporation. The plaintiff, an English financial institution located in London, engaged in the business of discounting and buying bills, making loans, etc. The defendant corporation was organized under the laws of Connecticut, located in Bridgeport, but during the year 1877 had its principal business office in the city of New York. For many years prior to 1877 A. B. Stockwell was president of the defendant company, and his brother, Levi S. Stockwell, treasurer; but the latter was both president and treasurer from

January until August, 1877. In 1876 and 1877 A. B. Stockwell was engaged in speculating in stocks in London, and for many years prior to 1877, and until after the acceptance of the bills in suit he had an open account with the defendant on its books. He made large deposits with it, and drew on it in large amounts, and at the time of the acceptance of the drafts in suit his account was largely overdrawn. He drew drafts on the defendant company at the times and to the amounts specified, as follows: In December, 1876, to the amount of forty-five thousand dollars; on February 6, 1877, to the amount of thirty thousand dollars; on March 28, 1877, to the amount of thirty thousand dollars,—all of which drafts were similar to the drafts in suit, and all were accepted and paid by the defendant; and all of these drafts were negotiated by the plaintiff for said A. B. Stockwell in a similar manner to the drafts in suit. On March 16, 1877, said A. B. Stockwell drew upon the defendant in favor of the plaintiff four drafts, three for ten thousand dollars each, and one for fifteen thousand dollars, all payable at ninety days' sight. All were addressed to the defendant, at its place of business in New York, and all were accepted on April 21, 1877, as of 7th of April, by Levi S. Stockwell, as treasurer of said defendant company. On March 26, 1877, the plaintiff, at the request of said A. B. Stockwell, indorsed these four drafts and sold them through a broker, one Baker, who also indorsed them to Montague & Co. The drafts were presented to the defendant for acceptance April 7th, and acceptance was refused, but afterwards, on April 21st, they were accepted, as above stated. Said drafts were not paid on maturity, and were duly protested for non-payment; and upon notice of their non-payment, the plaintiff, being an indorser thereon and payee therein named, paid to Montague & Co. the amount of said drafts, and took them up. At a directors' meeting of the defendant company in 1865, it was "resolved that the treasurer be, and he hereby is, authorized and empowered to make, sign, indorse, and accept notes, checks, and bills of exchange in the name and for and on account of this company, and generally to execute any and all papers relating to the business of the company." The directors adopted a resolution of similar import in 1874. It was shown that the directors and stockholders of the defendant company had knowledge of the accounts between the company and A. B. Stockwell, and that said Levi S. Stockwell, the treasurer, was accepting drafts drawn on said company by

said A. B. Stockwell; and there was no evidence that they ever objected to these transactions. J. Hume Webster is, and was during said transactions, the managing director of the plaintiff company, and also a member of the firm of Hume Webster & Co. of London, bankers. The plaintiff company, on making sale of said four drafts, paid over the proceeds, less commissions, to said A. B. Stockwell, who placed them to his account with said Hume Webster & Co., to whom he was then indebted in a much larger amount. Said J. Hume Webster had knowledge of the stock speculations of said A. B. Stockwell, and that the money obtained by him on the drafts drawn by him on the defendant company was used by him in such speculations; but the other members of the firm of Hume Webster & Co., and of the plaintiff company, had not such knowledge. Upon the above facts, the case was reserved for the advice of the supreme court.

R. S. Ranson and E. W. Seymour, for the plaintiff.

W. D. Shipman, and M. H. Cardozo, S. H. Wheeler, Jr., and G. Stoddard, for the defendant.

By Court, CARPENTER, J. As this case was commenced before the practice act went into operation, the pleadings are under the old practice. The defendant denies the matters alleged in the declaration, and gives notice, in substance, that it will prove that the treasurer of the defendant corporation was not authorized to accept these drafts; that the drafts being solely for the accommodation of the drawer, the company itself under its charter and by-laws had no power to accept them; and that the plaintiff is not a *bona fide* holder for value.

The defendant's notice alleges that these bills were not accepted by the defendant, or by or with its authority or consent, but were accepted by one of its officers without authority, and contrary to the provisions of its by-laws, of which the plaintiff had notice.

It is not contended that the treasurer had no power under any circumstances to accept any draft; for the votes of the directors and the course of dealing by the defendant clearly show that he had such power; but it is claimed that under the circumstances he had no power to accept these particular drafts. Obviously, the authority or want of authority in the treasurer to accept these drafts depended, not upon the nature of the act, but upon the attending facts and circumstances.

That he had power to accept drafts under some circumstances is not denied. Hence, if they were drawn on account of the defendant's business, or to draw out of its treasury money which belonged to A. B. Stockwell, the power of the treasurer to accept them would be conceded. But the strength of the defendant's position in this part of the case lies in the fact that the defendant was not owing Stockwell, and the money was not wanted for any purpose connected with the defendant's business. As between the Stockwells or either of them and the defendant, the acceptances were unauthorized and void; but as between the plaintiff and the defendant, the answer to the question we are considering hinges upon the answer to another question,—Is the plaintiff a *bona fide* holder for value?

The proper answer to that question we shall consider later; but assuming for the present that the answer may be an affirmative one, we pass to the next question, which is, Was the defendant authorized to accept accommodation drafts? Clearly not as to all parties with notice. But as corporations may accept drafts for some purposes, and as the purpose for which a draft is drawn does not ordinarily appear on its face, the question as to all parties with notice is, Was it drawn for a legitimate purpose? As to all others, the important inquiry is, Is the plaintiff a *bona fide* holder for value? And that brings us to the main question in the case.

A preliminary question of some importance which bears directly on this question is, On whom was the burden of proof? In the pleadings, the defendant assumes that burden; and properly so upon principle. The drafts apparently may be for a legitimate purpose. As there is some presumption that all parties act properly, and within the scope of their powers, the plaintiff establishes a *prima facie* case when it presents the drafts duly drawn and accepted, there being no circumstances indicating fraud or illegality. And so are the authorities: Edwards on Bills, 686, 689; Daniel on Negotiable Instruments, 626, 662; 1 Parsons on Notes and Bills, 255.

It is insisted that the plaintiff does not sustain to this defendant the relation of a *bona fide* holder for value, for the reason that the drafts were indorsed and negotiated by the plaintiff before they were accepted; and that therefore the plaintiff parted with nothing of value upon the credit of the acceptances. In support of this position, the case of *Farmers'*

and Mechanics' Bank v. Empire Stone Dressing Co., 5 Bosw. 275, is cited. We are unable to accept that decision as a correct exposition of the law. The court of appeals says of that case, in the case of *Heuertematte v. Morris*, 101 N. Y. 63, 54 Am. Rep. 657: "It is true that some expressions of the learned judge writing in that case may justify the citation, yet it should be considered that those remarks were unnecessary to the decision of the case, and the same court have twice since then refused to follow it. We conceive the rule there laid down finds no support in the doctrines of the text-writers or the reported cases. . . . If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay; and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment, refuse to accept a bill, and in that event, the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees, but also to the drawer himself."

It is not, therefore, true that the purchaser of a bill before acceptance trusts wholly to the credit of the drawer. He believes and expects that the drawee will accept; and upon such belief and expectation he acts. When Stockwell presented these bills to the plaintiff, he contracted that the drawee would accept and pay them. Upon that promise the plaintiff relied.

The reply to *Heuertematte v. Morris*, *supra*, is, that in that case the acceptor was an individual, and not a corporation; so that no question arose as to the validity of the acceptance. But the validity of the acceptance is not the question we are now considering. We have already endeavored to show that the acceptance in the case at bar bound the corporation as to a *bona fide* holder for value. The precise question now is, whether a person who receives an accommodation bill before acceptance, no new consideration moving from him to the drawee, can avail himself of a subsequent acceptance. In *Farmers' and Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. 275, it was held that he could not. In *Heuertematte v. Morris*, *supra*, it was held that he could. The latter case

was put upon the broad ground that the former was not law, and not upon any supposed distinction between corporations and individuals. The good faith of the holder must not be confounded with the validity of the acceptance. Although the latter may, and often does, depend upon the former, yet they are distinct questions for most purposes. An accommodation acceptance being valid, and the plaintiff otherwise a holder in good faith, the mere fact that he received the bill before acceptance does not make him a *mala fide* holder.

In *Arpin v. Owens*, 140 Mass. 144, the court say: "It is immaterial when an acceptance is made; it may be made at any time, and the rights of the payee and of the indorsee are the same after it is made, whether they were acquired in anticipation of it or subsequent to it."

These drafts were indorsed and sold by the plaintiff, and the avails were paid over to A. B. Stockwell. Stockwell paid the money so received to Hume Webster & Co. So far the transaction on its face is free from suspicion. It is not claimed that any fraud or illegality is found in terms. The most that can be claimed is, that there are certain circumstances in the case from which fraud may be inferred. Those circumstances are, that Stockwell had been previously speculating in stocks with the knowledge of Webster; that in doing so he had become largely indebted to Hume Webster & Co., a firm in which J. Hume Webster was a partner; that J. Hume Webster was the agent by whom the plaintiff indorsed and sold these drafts; and that the money received therefor was in a short time paid over to Hume Webster & Co. in part liquidation of Stockwell's indebtedness to that firm.

But these circumstances are not, in law, equivalent to fraud. At one time in England the question was held to be whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man: *Gill v. Cubitt*, 3 Barn. & C. 466. Afterwards the rule was so far modified as to require gross negligence: *Crook v. Jadis*, 5 Barn. & Adol. 909. Later still, gross negligence was held to be evidence of *mala fides* merely, and not the thing itself. In *Goodman v. Harvey*, 4 Ad. & E. 870, Lord Denman says: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of a contrary doctrine."

In *Swift v. Tyson*, 16 Pet. 1, Story, J., says: "There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by those facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity." "Notice of facts which impeach its validity," means knowledge of those facts: *Goodman v. Simonds*, 20 How. 343; and by "facts" is intended facts which of themselves impeach the transaction,—in this case fraud, and not other facts which tend to prove fraud or which excite suspicion: *Goodman v. Simonds*, *supra*. And such is the law of this state: *Brush v. Scribner*, 11 Conn. 388; 29 Am. Dec. 303. We think that is the law of this country; at least we are aware of no contrary decision.

"But it must still be true," as is said in 1 Parsons on Notes and Bills, 259, "that while gross or even the grossest negligence is a different thing from fraud, the negligence may be such, and so accompanied, as to afford reasonable and sufficient grounds for believing that it was intentional and fraudulent." By this we apprehend that no more is meant than that the evidence may be so strong as to justify the court in finding fraud, and applies only to courts that pass upon both questions of fact and law, and has no application to this court, which must take the facts as they are found by the court below.

It may be further claimed that the fraud here contended for is not the fraud of antecedent parties to the bills, but fraud, if it exists, to which the plaintiff itself is a party; and that if the facts and circumstances establish fraud with reasonable certainty, the court ought so to regard it, notwithstanding the fact that fraud is not expressly found. We apprehend that the proposition does not relieve the case of the objection that the question is still one of fact and not of law. Nevertheless, assuming that the principle involved in the proposition is a correct one, we will briefly examine the facts to see if it has any application to this case. To make the principle applicable, we think the facts should be of a conclusive character. If they are ambiguous, or consistent with the absence of fraud, they are not sufficient.

There are certain facts essential to the conclusive character of this evidence, which are wanting; and their absence is sig-

nificant. It is not found that Webster knew that Stockwell had no funds in the defendant's treasury, against which these drafts were drawn. If Stockwell had in fact had funds there, that would have effectually repelled any imputation of fraud. Webster's knowledge of the purpose of the drafts, a previous agreement even with Stockwell that the avails should be paid to Hume Webster & Co., would have been of no consequence. So also if he really believed that the bills were drawn against funds. That he did so believe is probable, as certain undisputed facts afford a reasonably good foundation for such a belief. For about three years Webster had known and had business dealings with Stockwell. Within a period of four months immediately preceding this transaction, the plaintiff indorsed and negotiated drafts by Stockwell on the defendant for seventy-five thousand dollars. Two days after the drafts in suit were negotiated, it indorsed and negotiated drafts by and on the same parties for thirty thousand dollars more. All these drafts were in fact accepted by the defendant, and paid at maturity.

In December, 1876, when Stockwell presented to the plaintiff drafts to the amount of forty-five thousand dollars, he, in legal effect, represented that he had funds in the defendant's hands; he virtually pledged his honor and reputation as a business man that it was true. When the defendant accepted those drafts, it admitted that those representations were true. The same representations were repeated by the parties in February, 1877, and on March 28th. All those representations were, for all the purposes of this case, true; for those drafts were all paid at maturity. Is it strange that the same representations made on the twenty-sixth day of March should be believed?

It is not found that Webster knew that the drafts were drawn for the purpose of raising money to pay to Hume Webster & Co. If he had not such knowledge, how could he be justly chargeable with a fraudulent intent?

Again, there is no finding that Stockwell was then in poor credit, or that Webster or Hume Webster & Co. supposed that they were in danger of losing by him. Hume Webster & Co. had, in the space of about one month, paid his checks to an amount exceeding one hundred thousand dollars. The plaintiff, during the same month, indorsed his drafts to the amount of seventy-five thousand dollars. These facts afford some ground for believing that both parties regarded him as trust-

worthy. If they did, pray what reason had they for colluding with Stockwell for the purpose of drawing money illegally and unjustly from the defendant?

Moreover, the circumstances relied on as showing fraud are in themselves weak, and will hardly justify, much less require, the inference claimed for them.

We may add that if bills of exchange, which are supposed to be the highest type of negotiable instruments, can be successfully impeached by such circumstances as exist in this case, the integrity of all such instruments must be seriously impaired, and their usefulness as a circulating medium well-nigh destroyed.

In the next place, it is claimed that the plaintiff is not a *bona fide* holder, because the defendant's treasurer had no power to accept accommodation drafts; that the corporation itself had no such power; and that the plaintiff was bound to take notice of the powers of a corporation and its officers, and of the extent of their authority.

On account of the complex character of this proposition, it can only be properly considered by treating each branch of it separately. We may admit generally that the treasurer had no authority to accept accommodation paper, and that the directors had no power to confer upon him such an authority. But in order to prevent injustice and maintain the integrity of mercantile paper, it is necessary to limit the application of the principle to parties with notice. This limitation necessarily results from the fact that every business corporation has power to deal in negotiable paper in the line of its business. As such paper does not ordinarily show on its face the circumstances of its origin or the purpose for which it is made, it becomes important to distinguish those who have notice of its character and purpose from those who have not. To say indiscriminately that the holder of accommodation paper made by a corporation cannot be a *bona fide* holder simply because it is accommodation paper, ignores this important distinction, and amounts practically to begging the question.

We pass now to the second branch of the proposition,—that persons dealing in commercial paper of a corporation are bound to take notice of the extent of its power. Here, too, we may properly admit that the proposition is a correct one; but care should be exercised in its application not to extend it beyond its appropriate limits. To clearly understand those limits, a distinction is to be observed between the terms of a

power and the circumstances under which it is exercised. Parties may well be required to take notice of the former; but to require them to have knowledge of the latter would in many cases result in gross injustice. Especially is this so where the agent or officer of the corporation which exercises the power at the same time represents the corporation, and speaks for it in giving information as to the circumstances under which it is exercised. No better illustration is needed than the case at bar. The treasurer of the defendant was the officer specially authorized by vote of the directors to accept bills of exchange; at the same time, by virtue of his office he was the person held out by the corporation as the proper one to inform holders whether the drawer draws against funds. The corporation virtually says, "You may safely trust the word of our treasurer on that subject." When he speaks, the corporation speaks. By accepting the draft he declares that the drawer has funds, and that is the declaration of the corporation. Mercantile paper does not require those who would become its holders to go to the acceptor and insult him by the question, Did you tell the truth when you accepted that paper? They have a right to assume that he tells the truth, and to act accordingly. If the treasurer in fact misrepresents the corporation, the corporation and not the person who trusts him should bear the loss.

An instructive and very interesting case on this subject is *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125. The defendant's counsel cite that case, and quote from it this sentence: "One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers." The court, however, clearly recognize the distinction to which we have adverted,—namely, between the terms of a power, and extrinsic facts which may or may not, according to the circumstances, affect the rights of third persons when the power is exercised. That was an action on a certified check. The defense was, that the bank had no funds of the drawer. Immediately following the sentence quoted the court uses this language: "If, therefore, a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact whether the bank has funds or not, the case is different. That

is a fact of which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowledge. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case. It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it."

This case also holds that a certified check is substantially an accepted bill of exchange. The principle involved therefore applies to this case, and is an authority against the defendant. It is true that, in the case at bar, the bills of exchange were not accepted when the plaintiff indorsed them; but we apprehend that that will not prevent the application of the principle. It is no uncommon thing for the payee to indorse a bill and put it in circulation before acceptance. The fact that he does so is in itself no evidence of bad faith.

The principle seems to be that a person dealing with a corporation is bound to know whether or not the officer or agent who represents it and acts in its name is authorized so to do. If he is, and the act is within the apparent scope of his authority, he is not bound to have knowledge of extrinsic facts making it improper for him to act in that case.

We must conclude, therefore, that the fact that the drawer had no funds in the hands of the drawee at the time these bills were drawn and negotiated, that fact being unknown to the plaintiff, is not a sufficient reason for holding that the plaintiff is not a *bona fide* holder.

It is further claimed that the plaintiff is not a *bona fide* holder for value on account of the use which was made of the proceeds of these bills, they having been paid to Hume Webster & Co. to apply on a debt due that firm from Stockwell. This argument assumes, what we cannot admit, that the payment was equivalent to a payment to the plaintiff on a debt

due it. The firm of Hume Webster & Co. and the plaintiff are in fact and in law two distinct persons; and we must so regard them until fraud or collusion is established which will make one responsible for the acts of the other. If the plaintiff was guilty of no fraud,—and for reasons already suggested we must assume that it was not,—then the plaintiff in good faith paid full value for these bills. If we were at liberty to regard this as a scheme devised by Webster (acting in the name of the plaintiff, but really for Hume Webster & Co.) and Stockwell, to defraud the defendant for the benefit of Hume Webster & Co., we might be justified in holding that the plaintiff is not a *bona fide* holder. But we cannot reach that result as a legal conclusion from the facts as they appear. The main fact, the one thing essential to that conclusion,—an arrangement to that effect then or previously made,—is not found.

For these reasons a majority of the court are of the opinion that the plaintiff is entitled to recover, and the superior court is so advised.

PARK, C. J., dissented, being of opinion that the plaintiff corporation was not a *bona fide* holder of the drafts in question, for the following reasons, in brief: "The defendant corporation was limited by its charter to such use of mercantile paper as might be necessary in the prosecution of its business; and the plaintiff was bound to take notice of this limitation, and conduct itself accordingly. The plaintiff knew, through Hume Webster, its managing director, that the proceeds of these drafts were not to be used by the defendant in the prosecution of its business, but were to be used by the drawer, A. B. Stockwell, for his own individual purposes in London, while engaged in speculating in stocks." He concludes: "I think the declarations of Stockwell gave Webster clearly to understand that the drafts were accommodation paper, and that consequently the plaintiff was not a *bona fide* holder of them, and judgment should be rendered for the defendant."

NATURE OF ACCEPTOR'S CONTRACT: *Parks v. Ingram*, 55 Am. Dec. 153; *Heaverin v. Donnell*, 45 Id. 302; *Swope v. Ross*, 80 Id. 567, and note 570; *Kupfer v. Bank of Galena*, 85 Id. 309; acceptance for honor: *Smith v. Sawyer*, 92 Id. 576, and note 579; acceptance may be by parol: *Jarvis v. Wilson*, 33 Am. Rep. 18.

ACCEPTANCE OF BILL UPON CONDITION, AND EFFECT OF: *Ford v. Angelrodt*, 88 Am. Dec. 174, and note 178; *Wells v. Brigham*, 52 Id. 750.

PRESUMPTION FROM ACCEPTANCE OF BILL, THAT ACCEPTOR HAS FUNDS OF DRAWER IN HIS HANDS, MAY BE REBUTTED, as between drawer and acceptor, by showing that the bill was accepted and paid for the drawer's accommodation: *Griffith v. Reed*, 34 Am. Dec. 267, and note 270.

ACCEPTANCE OF BILL BINDS ACCEPTOR IN FAVOR OF INDORSEER FOR VALUE, notwithstanding that the consideration upon which he accepted was an executory contract which was not performed, and that the indorsee took with notice of the nature of the consideration, though not of the breach: *Davis v. McCready*, 72 Am. Dec. 461.

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And by the law of New York, "the holder of an acceptance thus fraudulently made cannot enforce it, if he merely received and applied it upon a pre-existing debt, and did not part with any right or property on the faith thereof. Such application is the legal equivalent of notice of the vice in the acceptance, puts the holder beyond the pale of *bona fides*, and previous payments to him as a *bona fide* holder do not harden into a usage binding upon the corporation after he ceases to occupy that position." The court fully reviews the New York cases bearing on the question, and cites the following, among others, in support of the rule as above stated: *Philbrick v. Dallett*, 2 Jones & S. 370, 12 Abb. Pr., U. S., 419, 43 How. Pr. 419, holding that where a draft is taken on account of an antecedent debt, without surrendering anything, the subsequent acceptors are not precluded from showing that their acceptance was procured by the fraud of the drawers, and was wholly without consideration: *Lawrence v. Clark*, 56 N. Y. 128; *Turner v. Treadway*, 53 Id. 650; *Weaver v. Barden*, 49 Id. 286; *Comstock v. Hier*, 73 Id. 269. Compare *Justh v. National Bank*, 45 How. Pr. 492; 4 Jones & S. 273; 56 N. Y. 478. Nevertheless, in *Webster & Co. v. Howe Machine Co.*, *supra*, the court sustains the doctrine of the principal case, that where the holder of such an acceptance takes it without notice, that it was for the accommodation of the drawer, and the acceptance was by an officer of the company authorized to accept if the drawer had funds in the company's hands, the holder is not affected by the extrinsic fact of want of funds, and can recover upon the acceptance if he is a *bona fide* holder for value; for, as between such holders of negotiable paper without notice, and stockholders of a corporation, the law gives preference to the former. So, in a recent case in New Jersey, the court states it to be the general doctrine of the law that where a corporation has power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances which give the requisite authority, and the doctrine is applied to commercial paper made by a corporation for the accommodation of a third person when in the hands of a *bona fide* holder, who has discounted it before maturity on the faith of its being business paper: *National Bank v. Young*, 5 Cent. Rep. 113 (N. J.), citing *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, 101 Id. 57; 3 Am. Rep. 322; *Mechanics' Bank Assoc. v. White Lead Co.*, 35 N. Y. 505. The right of such a holder to recover can be defeated only by proof of such circumstances as show that he took the paper with knowledge of some infirmity in it, or with such suspicion with regard to its validity as that his conduct in taking it was fraudulent: *National Bank v. Young*, *supra*.

As a general proposition, an acceptance can only be discharged by payment, or a release, except in cases where to enforce the payment by the acceptor would be in violation of the agreement of the parties at the time of the acceptance: *Cronise v. Kellogg*, 20 Ill. 11. In a suit against the acceptor, he will not be permitted to insist that there was no consideration for the acceptance: *Nowak v. Excelsior Stone Co.*, 78 Id. 307; *Law v. Brinker*, 6 Col. 555; and see *Vanstrum v. Liljengren*, 33 N. W. Rep. 555 (Sup. Ct. Minn.); *Clement v. Everett*, 12 N. H. 317; *Corbett v. Clark*, 45 Wis. 403; 30 Am. Rep. 763; *Jarvis v. Wilson*, 46 Conn. 90; 33 Am. Rep. 18. If one accepts a bill to enable the drawer to obtain credit or money, though there is no consideration between the drawer and acceptor, and though the subsequent holder for value knows it to be accommodation paper at the time he takes it, he can enforce it against the acceptor: *Arnold v. Sprague*, 34 Vt. 402; *Davis v. Randall*, 115 Mass. 547; 15 Am. Rep. 146; *Marsh v. Low*, 55 Ind. 271. In other words, one who accepts for the accommodation of another, and thereby

procures a benefit to such other, cannot refuse to meet his obligation to him who conferred such benefit because of want of consideration: *Meggett v. Baum*, 57 Miss. 22, 27; *Hamilton v. Catchings*, 58 Id. 92. So the obligation of an acceptor is an express one, and the legal effect of an acceptance, as an absolute contract to pay, cannot be varied by parol. It is not competent for the acceptor to contradict the written contract by proof of an oral agreement that he accepted upon the condition that he should not be called upon to pay according to the tenor of the paper: *Wright v. Morse*, 9 Gray, 337; *Davis v. Randall*, 115 Mass. 547; 15 Am. Rep. 146; *Heaverin v. Donnell*, 7 Smedes & M. 244; 45 Am. Dec. 302. Thus the drawee of a bill of exchange, drawn by the "Kanawha and Ohio Coal Co.," was described as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co."; and it was held that the acceptance was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant intended to bind the drawer as his principal, and that this was known to the plaintiff when it acquired the paper: *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441; 58 Am. Rep. 829. But parol evidence is clearly admissible to explain an acceptance which is ambiguous on its face: *Gallagher v. Black*, 44 Me. 99; *Shackelford v. Hooker*, 54 Miss. 716; *Lamson v. French*, 25 Wis. 37. And it should be remembered that a bill of exchange may be accepted orally, where a statute does not require the acceptance to be in writing: *Dunovan v. Flynn*, 118 Mass. 539; *Jarvis v. Wilson*, 46 Conn. 90; 33 Am. Rep. 18; and if a bill with a parol acceptance comes into the hands of a party, although he does not know of that acceptance, he may avail himself of it afterwards when it comes to his knowledge: *Spaulding v. Andrews*, 48 Pa. St. 411. And the validity of a parol promise to accept an existing or non-existing bill has been maintained: *Nelson v. First Nat. Bank*, 48 Ill. 36; but see *Bank of Ireland v. Archer*, 11 Mees. & W. 385. But in order that one may be held liable as acceptor of a bill, drawn in pursuance of a promise to accept, and upon the faith of which the holder has advanced money, it is necessary that the bill should be drawn within a reasonable time after the promise is made, and the promise must so describe the bill that there can be no doubt of its application to it: *Coolidge v. Payson*, 2 Wheat. 66; *Cassel v. Dows*, 1 Blatchf. 335; *Carnegie v. Morrison*, 4 Met. 406; *Lynch's Case*, 52 Md. 270. And one cannot be held liable for a breach of promise in not accepting, unless there was a promise to accept at the time the bill was drawn: *First Nat. Bank v. Clark*, 61 Id. 400; 48 Am. Rep. 114; and see *Brinkman v. Hunter*, 72 Mo. 172; 39 Am. Rep. 492; *Bissell v. Lewis*, 4 Mich. 450; and the party sought to be charged should be permitted to show all that was said and done to determine whether he assented to the request to accept: *Cook v. Baldwin*, 120 Mass. 317.

According to the later English authorities, the acceptor of a bill for the accommodation of the drawer sustains the relation of surety to him, and is entitled to all the rights of one occupying that position in any case: See *Ewin v. Lancaster*, 6 Best & S. 572; *Baily v. Edwards*, 4 Id. 761; *Fletcher v. Heath*, 7 Barn. & C. 517. In accordance with this view, it was held that an accommodation acceptor is released by a contract of forbearance to the drawer, made by the holder of the bill, with knowledge of the fact that the acceptance was for accommodation: *Meggett v. Baum*, 57 Miss. 22. But the weight of the American authorities is to the effect that an accommodation acceptor occupies the same position as one who accepts with funds as to all

persons who receive the bill for value, whether they know that it was an accommodation acceptance or not. Even if the holder knew at the time he received the bill that it was accepted for accommodation, his rights and duties are in no respect altered, and no release of an indorser or drawer will discharge the acceptor: *Cronise v. Kellogg*, 20 Ill. 13; *Claremont Bank v. Wood*, 10 Vt. 182; *Lambert v. Sandford*, 2 Blackf. 137; *White v. Hopkins*, 3 W. Va. 101; *Hansborough v. Gray*, 3 Gratt. 356; *Lewis v. Hanchman*, 2 Pa. St. 416; *Stephens v. Monongahela Nat. Bank*, 88 Id. 157.

GRISSELL v. HOUSATONIC RAILROAD COMPANY.

[54 CONNECTICUT, 447.]

STATUTE MAKING RAILROAD COMPANIES LIABLE IN DAMAGES FOR INJURY DONE TO "BUILDING OR OTHER PROPERTY," by a fire communicated by their locomotives, without contributory negligence on the part of the owner of the property, and which gives the railroad company an insurable interest in the property liable to be injured, is not unconstitutional and invalid, either as denying to such companies the equal protection of the laws, or as taking away their property without due process of law, or as impairing their rights under their charters to use fire, steam, and locomotive-engines. Such statute is valid, even in its application to pre-existing railroad companies.

LEGISLATURE MAY DEPART FROM COMMON-LAW PRINCIPLE, that for a lawful, reasonable, and careful use of property the owner cannot be made liable, where protection to persons or property may require such departure.

CONSTITUTIONAL LAW. — One using extrahazardous materials or instrumentalities may be made to bear the risk and pay the loss thereby occasioned to the property of another, if there is no fault on the part of the latter, even though negligence on the part of the former cannot be proved.

EXPRESSION "BUILDING OR OTHER PROPERTY," USED IN CONNECTICUT STATUTE, MAKING RAILROAD COMPANIES LIABLE for fires caused by their locomotives, without contributory negligence on the part of the owner of the property, includes fences, growing trees, and herbage. The provision in the statute, giving the railroad company an insurable interest in the property liable to be injured, does not limit the liability of the company for injury to property such as is ordinarily regarded as insurable.

ACTION for the recovery of damages for injuries to the plaintiff's property resulting from fire communicated by the locomotive of the defendant company. The verdict was for the plaintiff, and the defendant appealed. The material facts appear in the opinion.

M. W. Seymour and H. H. Knapp, for the appellant.

J. S. Turrill, for the appellee.

By Court, LOOMIS, J. This action is founded on the statute of 1881 (Session Laws of that year, chapter 92), the first section of which is as follows: "Where an injury is done to a building or other property of any person or corporation by a fire communicated by a locomotive-engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

The plaintiff was the owner and possessor of land adjoining the defendant's railroad track in the town of New Milford, and certain of his fences, growing trees, and herbage thereon were destroyed by fire communicated by the defendant's locomotive-engine. There was no contributory negligence on the part of the plaintiff, and he brought this suit to recover damages for the injury received, and obtained a verdict in his favor in the court below.

The defendant gives six distinct reasons for his appeal to this court, but none of them can avail to set aside the plaintiff's verdict if the statute is valid, and can be construed to cover the property injured. Our discussion therefore will be confined essentially to these two points:—

1. Is the statute a valid one?

The defendant's counsel, in his argument, presented a powerful arraignment of the statute as denying to railroad corporations the equal protection of the laws, in that it makes them liable for the consequences of a lawful act without any fault or negligence, and as taking away their property without due process of law, in that it deprives them of a legal defense, and as impairing the rights given them by their charters, which authorize the use of fire, steam, and locomotive-engines, while requiring trains to be run for the benefit of the public, for the unavoidable consequences of which acts the statute makes them liable. The several counts in this indictment seem to be based principally upon this one principle of the common law, that for a lawful, reasonable, and careful use of property the owner cannot be made liable.

But this principle is not so wrought into the constitution, or into the very idea of property, that it cannot be departed from

by the legislature where protection to persons or property may require it.

But the defendant also invokes another principle, which, it is claimed, the statute violates; namely, the equal protection of the law. But to give force to this objection, it should appear that a burden is cast on railroad corporations from which all others are exempt under similar circumstances. There can, of course, be no such inequality if the circumstances are radically different. This consideration seems to have been ignored in the argument for the defendant, or else it was erroneously assumed that the circumstances were similar. Some of the cases cited in behalf of the defendant will illustrate the distinction to which we refer.

In *Durkee v. City of Janesville*, 28 Wis. 464, 9 Am. Rep. 500, an act had been passed providing that the city of Janesville should be holden to pay no costs in any action brought against it to set aside any tax assessment or tax deed, or to prevent the collection of any tax. The act was held void, because it exempted one corporation by name from a burden from which no other was exempt under like circumstances, and it enabled the city to recover its own costs if it recovered judgment, but denied it to the other party to the same litigation in case judgment was recovered against the city. So in *Ohio and Mississippi R. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259, an Illinois statute was held unconstitutional and void which made the railroad company liable for all the burial expenses and coroner's fees incurred, where any one happened to die or be killed in any way in the cars of such railroad. This act attempted to make the company liable, though a person might die from a mortal sickness which was upon him when he entered the car, or by his own hand, or in other ways, in regard to which the company would have no agency whatever. The distinction between such a case and the one at bar is too manifest to require further comment.

The only case cited which supports the defendant's position in the least is the case of *Zeigler v. South etc. Alabama R. R. Co.*, 58 Ala. 594, where a statute of that state was held unconstitutional which declared that railroad corporations should be liable, and make compensation to the owner for all damage to live-stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train was operated, unless there was some contributory negligence on the part of the owner other than permitting the stock to run

at large. There might be a difference of opinion in different jurisdictions as to the validity of such legislation. But assuming, for the sake of argument, that the decision was right, there is an important distinction between the two cases. There the animals injured were where they ought not to have been, — trespassers obstructing the defendant's railroad track, directly exposing the defendant's property to hazard and loss; here the property injured was where it ought to have been, — on the plaintiff's own premises, occasioning no hazard to the railroad company. There, too, it was possible for the owner to have kept his stock on his own premises, where they would have been safe; but here it was not possible for the plaintiff to avoid the loss that he suffered by any act of his own.

It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extrahazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved. If the statute should make the owner of a vicious domestic animal liable for the damage it might occasion, without proof of *scienter*, or knowledge of its vicious propensity, as required by the common law, we do not think the act would be void. Such a statute would only be a new application of an ancient common-law principle, that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who caused the loss, rather than upon the other, who had no agency in producing it, and could not by any means have avoided it.

An ancient statute of this state, which has been very often enforced, makes the owner of dogs, or if the owner is a minor or an apprentice, the parent, guardian, or master, liable for all the damage done by them, irrespective of any fault or negligence on the part of the owner: Gen. Stats., p. 267, sec. 5. Another statute (Gen. Stats., p. 489, sec. 6) makes one who kindles a fire on his own or any land liable for all damage it may do if it runs upon the land of another, and proof of negligence is not required. We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always

been subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgment (Action on the Case, B, title Fire), it is said: "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who entered the house with my consent. But otherwise, if it is caused by a stranger who enters the house against my will."

It ought, perhaps, to be stated that this has not been adopted as the common-law rule in the United States. In most states, we presume, there are arbitrary police regulations concerning the transportation or deposit of gunpowder. Would the constitutionality of a statute be questioned that should make one who deposits large quantities of gunpowder or dynamite on his own premises, in dangerous proximity to the property of another, liable for any loss thereby occasioned to the latter, without proof of negligence?

There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons, whether wet or dry, with locomotive-engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that, too, for the sole profit of the corporation. The argument for the defendant is fallacious, in erroneously assuming that the statute denies to the defendant a good defense which, at common law, all others would have under similar circumstances.

In *Jones v. Festiniog R'y Co.*, L. R. 3 Q. B. 733, in a suit against an unchartered railway company, it was proved by the defendants that all reasonable precautions had been taken to prevent the emission of sparks from a locomotive-engine used by them. But it was held, nevertheless, that they were liable, on the ground that the locomotive was a dangerous engine to be brought and used by the defendants even upon their own premises, and that they must bear the consequences

in case of damage to others. Wharton, in his treatise on negligence, section 868, lays down the same doctrine as to the liability of unchartered companies at common law.

How, then, can it transcend the limits of just and valid legislation to attach to chartered railroad companies, for doing the same act, under the same circumstances, the same liability, where the charter, as in this case, is an open one, expressly made subject to all general laws?

In *Hooksett v. Concord R. R. Co.*, 38 N. H. 242, where the construction of a similar statute was under consideration, Eastman, J., in giving the opinion of the court, used this suggestive language: "The extraordinary use of the element of fire, by which the property of individuals situated along the lines of railroads becomes endangered beyond the usual and ordinary hazard to which it is exposed, no doubt caused the legislature to interfere. . . . By this exposure, an increased risk of loss of property is caused. The risk must be borne by some one; and if the property is insured, a larger premium must be paid. Upon whom shall this risk fall, and this burden rest? Upon the owners of the property, or upon the corporations who make this extraordinary use of the fire?"

The only answer, it seems to us, which a due sense of justice can dictate, is the one given in that case,—that the responsibility and burden should rest on the corporations. No other mode of adjusting this risk can be suggested so just towards all parties as this. Before the statute, upon taking land for railroad purposes, it was possible, upon the appraisal, to include something for the increased risk to buildings on the land not taken, confining it, however, to the diminished value of the remaining property caused by the risk: *Pierce on Railroads*, 215; *In re Utica etc. R. R. Co.*, 56 Barb. 456; *Wilmington and Reading R. R. Co. v. Stauffer*, 60 Pa. St. 374. But it would seem extremely difficult to make any just appraisal even on this limited basis; and it could have no application to buildings afterwards placed on the land, nor to buildings which might be destroyed by fire from this source on land more remote from the railroad, no part of which was taken or appraised, nor to any personal property whatever. And it would of course be utterly impracticable to assess beforehand damages for property that might be destroyed in the future.

And here we may suggest that the statute under consideration, though often characterized as arbitrary, is really based on a principle quite similar to that which allows an assessment in

favor of the land-owner, founded on the risk of fire from the same source. In both cases, it is assumed that there is a risk, and that it is justly placed on the corporation. The statute carefully guards the interests of the corporations by giving them an insurable interest in all the property for which they may be made liable, and section fourth provides that no appraisal of damages for land taken or injured by the location or construction of a railroad shall hereafter include any compensation for the increased risk to any building outside of such location, on account of sparks from the locomotive-engines on such railroad.

This last provision suggests that the statute is not quite so equitable in its application to the defendant company, which established its railroad before the statute was enacted, as to corporations afterwards formed. It can of course derive no benefit from this provision, except as to land it may have taken since the enactment of the statute. The record is silent as to when the land in question was taken, or whether or not anything was at the time included or claimed as damages on account of the risk from fire to the property now owned by the plaintiff. No question founded on these facts was made in the court below, and of course is not to be entertained in this court for the purposes of decision. We may, however, remark, as to the general provisions of the statute, that if they are valid as to railroads to be established, they may be equally so as to railroads already in existence. The defendant's charter not only contains an explicit reservation for the legislature to alter, amend, or repeal it, but makes it also in terms subject to all general laws the legislature may thereafter pass. And as to any defense suggested by the assumption that an appraisal of the general risk from fire may have been made to the plaintiff originally, or his grantor, while we reserve a final decision of the question for the case in which it properly arises, we may here suggest that where the original appraisal only gave damages to the extent that the property was diminished in value in consequence of the risk, and the same property is afterwards destroyed, the damages to be recovered under the statute would of course only represent the remaining or diminished value, so that the statute cannot properly be charged with allowing double damages for the same thing.

In other jurisdictions, the original appraisal and the indemnity provided by the statute have not been considered so inconsistent as that both might not exist together: *Pierce v.*

Worcester and Nashua R. R. Co., 105 Mass. 199; *Bangor etc. R. R. Co. v. McComb*, 60 Me. 290; *Adden v. White Mt. etc. R. R. Co.*, 55 N. H. 413; 20 Am. Rep. 220; *Lyman v. Boston etc. R. R. Co.*, 4 Cush. 288.

In further confirmation of our reasoning as to the validity of the statute, we make the following citations: —

Redfield, in his treatise on the law of railways, in the first edition, page 360, published in 1857, alluding to the statutes similar to the one under consideration, said: "We cannot forbear to add that the interference of the legislatures upon this subject in many of the American states seems to us an indication of the public sense in favor of placing the risk in such cases upon the party in whose power it lies most to prevent such injuries occurring." In *Pierce on Railroads*, p. 444, it is said: "Statutes have been enacted making the company liable, even in the absence of negligence, for injuries to private property caused by fire communicated by its engines, which, in effect, make it an insurer in case of such injury. These statutes are constitutional, even when applied to pre-existing corporations." In 2 *Wood's Railway Law*, sec. 331, it is said: "In some states railway companies are made liable, irrespective of the question of negligence, for fires set by their engines, and as a compensation for this extraordinary liability are given an insurable interest in such property; and these statutes have been held constitutional, even in their application to corporations established before the statute was passed, and although damages for the risk of fire were considered when the land was taken." In the well-considered case of *Rodemacher v. Milwaukee etc. R. R. Co.*, 41 Iowa, 297, 20 Am. Rep. 592, the court discussed at length the constitutionality of a provision of the code of that state, that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," and fully sustained the act, even as applicable to pre-existing railways.

The counsel for the defendant in the case at bar sought to impair the force of the decision by reason of the fact that in Iowa the code had entirely supplanted the common law. The distinction seems to us not well taken. The legislature surely could acquire no additional power by exercising its sovereign will twice, — first in abolishing the common law, and then in enacting the statute. And the objection as to inequality before the law so persistently urged against our statute applies with

equal force to the provision of the Iowa code, for that applies exclusively to railway corporations the same as our statute.

In *Lyman v. Boston etc. R. R. Co.*, 4 Cush. 290, it was held that a similar statute in Massachusetts was applicable to railroads established before as well as since its passage, and that it extended as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law. The constitutionality of the statute was not discussed, but the principles stated as constituting its foundation directly apply. Dewey, J., in delivering the opinion, on page 291 said: "We consider this one of those remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive-engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify." This reasoning clearly makes the legislation in question a legitimate exercise of the police power of the state. See also the comments of Shaw, C. J., in delivering the opinion in *Hart v. Western R. R. Corp.*, 13 Met. 105, 46 Am. Dec. 719; and of Bigelow, C. J., in *Ross v. Boston etc. R. R. Co.*, 6 Allen, 90.

2. The remaining question relates to the construction of the statute. Do the words "other property" embrace fences, growing trees, and herbage, the property injured in this case?

The entire description in the statute is "building or other property," and the defendant invokes the benefit of the principle of interpretation known as *noscitur a sociis*,—that is, that the particular word "building," being followed by the general words "or other property," the latter only includes subjects *eiusdem generis*.

This rule has been often recognized and applied, but we think its application to this case would work injustice and tend to defeat in part the object of the statute. The statute is clearly remedial, and ought to be construed liberally to effectuate the intention of the legislature, which was to give the owners of property along the route of the railroad indemnity for the loss of all property that might reasonably be said to be exposed to danger from the source referred to. And besides, the above maxim would be exceedingly difficult of application, unless the words "other property" should be entirely rejected. The hay, grain, farming tools, and live-stock

in a barn, the goods in a store, the personal property in a house or factory, would hardly be *ejusdem generis* with a "building"; and can it be possible that the legislature intended only a partial indemnity for the building alone, overlooking the greater value of property within and without?

Then, as to growing trees, the legislature would have in view the fact that railroads traverse the forests as well as the open fields, and that, by reason of the annual deposit of dry leaves, the former were peculiarly exposed to danger from fire; and again we ask, Can it be supposed that in framing a general act of indemnity the owners of this species of property were not to be included?

There is some disagreement as to the construction of this language as used in similar statutes in other jurisdictions, but in no instance has such property as was injured in this case been excluded. In the state of Maine it is extended to all property having a permanent location along the route, such as buildings and their contents, fences, trees, and shrubbery, but it is held not to extend to a pile of cedar posts temporarily deposited near the railroad: *Chapman v. Atlantic and St. Lawrence R. R. Co.*, 37 Me. 92; *Pratt v. Atlantic and St. Lawrence R. R. Co.*, 42 Id. 579.

But it is said that a proper interpretation of the language we have been considering cannot be reached without first determining whether the railroad company could have procured insurance on the property injured. The argument in brief is, that, as the statute gives a railroad company an insurable interest in all the property for which it may be made liable, it cannot be made liable where no insurance could have been obtained. Hence in this case a witness was offered to testify that he knew of no insurance company that would insure fences, growing trees, and herbage. This testimony was rejected, and this is made a distinct ground of error; but as we stated at the outset, it depends upon the construction of the statute, and requires no separate consideration.

The statute would be extremely uncertain if its enforcement depended on the ability of the railroad company to obtain insurance. The withdrawal of insurance companies from issuing policies in a particular state, owing to unfriendly legislation or an alteration of their charters, might in effect nullify the law as to railroads in that state.

Undoubtedly, the statute confers an insurable interest co-extensive with the property for which the railroad company may

be responsible, and gives liberty to obtain such insurance in its own name with any other party who is able and willing to contract relative to the subject-matter. If there was an inherent impossibility of obtaining insurance upon any particular species of property, the argument would have more force, but there is no such impossibility. It is a matter of common information that the scope and subject-matters of insurance are being extended constantly in all directions, so that now there are insurance companies that issue policies of insurance against a great variety of hazards, both physical and moral. The reason for conferring this insurable interest upon the railroad companies will further illustrate its meaning and effect. Before the statute, the risk from fire was upon the owner of the property, and he alone had an insurable interest; but as the statute shifted the risk from the owner to the railroad company, it also, as a matter of justice and equity, conferred upon the latter the insurable interest, with the right to obtain in its own name such insurance. The corporation now has the same capacity to contract for insurance that the owner had before. All that is needed to make a valid contract is a corresponding capacity on the part of some other corporation or individual. The statute, however, does not concern itself with the last-named party.

In Massachusetts, a statute containing the same language as to the description of the property and insurance has been construed to include all kinds of combustible property, real and personal, even where the corporation had no knowledge or reasonable cause to believe that there was property situated where it was exposed to injury: *Ross v. Boston and Worcester R. R. Co.*, 6 Allen, 87. In *Trask v. Hartford and New Haven R. R. Co.*, 16 Gray, 71, a part of the property injured consisted of a fence, and Hoar, J., in delivering the opinion of the court, said: "A fence is not so commonly insured, probably because its value and risk do not make insurance desirable; but it certainly can be insured. Whether a just construction of the statute of 1840 would require any limitation of the extremely comprehensive language used to define the liability of railroad corporations created by it, this case gives us no occasion to consider. We certainly do not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable, in the ordinary or commercial sense of that word, to make the corporation liable." In the state of Maine, the clause in their statute relative to insurance has been ap-

plied, in the construction of the statute, so as to restrict its operation to such property, real or personal, as has some permanent location along the route of the railroad, because, as they say, it would not otherwise be practicable to obtain insurance; but as we have seen, the courts of that state find no difficulty at all in extending the statute to fences and growing trees: *Chapman v. Railroad Co.*, and *Pratt v. Railroad Co.*, before referred to.

For the foregoing reasons, we conclude that there was no error in the judgment complained of.

STATUTE IMPOSING DUTY ON RAILROAD COMPANIES TO CONSTRUCT FARM-CROSSINGS, for the use of the owners of land adjoining their tracks, is constitutional, even in respect to companies chartered before its passage: *Illinois Cent. R. R. Co. v. Willenborg*, 57 Am. Rep. 862; *Portland etc. R. R. Co. v. Inhabitants etc.*, 57 Id. 784; and see *Pennsylvania R. R. Co. v. Riblet*, 5 Id. 360.

STATUTE REQUIRING RAILROAD ENGINEERS TO BE EXAMINED AND LICENSED BY BOARD APPOINTED by the governor, and making it a misdemeanor for any one to operate an engine without being thus licensed, is constitutional: *McDonald v. State*, 60 Am. Rep. 158.

CONSTRUCTION OF STATUTE MAKING RAILROAD COMPANIES LIABLE FOR INJURIES CAUSED BY FIRE FROM THEIR LOCOMOTIVES, and giving them an insurable interest in property exposed along their lines: See *Rowell v. Railroad Company*, 24 Am. Rep. 59; *Simmonds v. Railroad Company*, 52 Id. 587; *Perley v. Railroad Company*, 96 Am. Dec. 645.

STATUTE PROVIDING THAT ALL RAILROAD COMPANIES SHOULD BE LIABLE FOR DAMAGES FROM FIRES CAUSED BY OPERATING THEIR ROADS IS VALID AND CONSTITUTIONAL as to railroads incorporated before the statute was passed: *Rodemacher v. Railroad Company*, 20 Am. Rep. 592.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE.

**DERINGER'S ADMINISTRATOR v. DERINGER'S AD-
MINISTRATOR.**

[5 HOUSTON, 416.]

FOREIGN ADMINISTRATOR ACTS in this state by virtue of the power originally granted to him; and the laws of this state recognize him as such upon the mere production of his duly authenticated commission, and thereupon concede him the powers of administrator appointed by the courts here.

PAYMENT TO FOREIGN ADMINISTRATOR is good, although such administrator has neither given security nor recorded his letters of administration.

CORPORATION CANNOT TAKE OUT LETTERS OF ADMINISTRATION under the laws of this state.

CORPORATION, WHEN ACTING WITHIN SCOPE OF ITS AUTHORITY, has all the powers of ordinary persons, and when so acting, its contracts, whether sealed or unsealed, written or unwritten, are valid.

CORPORATION MAY ACT AS ADMINISTRATOR when the law of the state does not require the administrator to take an oath, or to do any other act which a corporation is incompetent to perform.

CORPORATION MAY BE TRUSTEE BOTH OF REAL AND PERSONAL PROPERTY, and its authority as such is the same as that of an individual so acting.

CORPORATION, UNLESS PROHIBITED BY ITS CHARTER or by statute, has power to make all contracts requisite for the purposes for which it was created.

FOREIGN CORPORATION HAS FULL POWER TO EXECUTE BOND, and when this is done, it has complied with the law of this state as to the qualification of a foreign administrator.

FOREIGN CORPORATION HAVING ACTED AS ADMINISTRATOR in the state where it was created may act as such in this state, and may bring suit here.

COMITY OF ONE STATE WILL ENFORCE LAWS OF ANOTHER STATE, when such enforcement neither violates its own laws nor infringes the rights of

its own citizens; and on like terms it will permit a corporation of another state to transact business within the state into which it comes.

RIGHT OF FOREIGN CORPORATION TO DO BUSINESS within this state cannot be called in question except by the state itself.

LAW OF SITUS PREVAILS OVER LAW OF DOMICILE as to the order of payment of debts of deceased, when decedent's estate is insolvent.

ASSUMPSIT by the plaintiff, a foreign corporation, suing as administrator of Theophilis T. Deringer, deceased. The questions raised, and the facts on which they are based, appear from the opinion.

By Court, WALES, J. This is an action of *assumpsit* on certain promissory notes and due bills which were made by the intestate of the defendant to the intestate of the plaintiff. The pleas are *non assumpsit*, the act of limitations, *plene administravit*, except the sum of \$222.84, and a special plea to the effect and in substance that the plaintiff is a foreign corporation existing under the laws of another state, with power to administer the estates of deceased persons; "that such power is repugnant to the policy and prejudicial to the interests of this state and of its citizens; and that the action against this defendant being in that character cannot be maintained," etc. The replication to this plea sets forth that the plaintiff is a corporation created by and organized under the laws of Pennsylvania, and by said laws "is authorized to accept and execute the office and appointment of executor or administrator or other trustee, and to accept and execute all such trusts of every description not inconsistent with the laws of the state of Pennsylvania, as may be committed to it by any person or persons whatever, or by any corporation or register of wills, or by any court of record, whether of the said state of Pennsylvania or any other state or of the United States; that the plaintiff hath been duly appointed and qualified as administrator as aforesaid of Theophilis T. Deringer by the register of wills of the city and county of Philadelphia, in the state of Pennsylvania, and by virtue of said power, office, and appointment is entitled to maintain this action," etc. To this replication there was a general demurrer, on which the court below gave judgment for the defendant. The plaintiff assigns this judgment as error.

It is an elementary rule that a general demurrer reaches back through the whole record and attaches upon the first substantial defect in the pleadings. Under the operation of this rule, the question of the right of the plaintiff in its capacity

as an administrator to maintain an action in the courts of Delaware is brought before us for consideration. For although the special plea may be defective, as contended by the plaintiff's counsel, yet if it appears from a full inspection that the declaration is substantially wrong in its inception, in that the plaintiff has no standing in court, judgment cannot be given for the plaintiff, because a bad plea is sufficient for a bad declaration (Gould's Pl. 475), and cannot give a right of action where none exists. If, therefore, at any stage in the progress of a cause a material error should be discovered, as a want of jurisdiction of the cause of action or of the person of either of the parties, it would be the duty of the court to take notice of the error, and render judgment accordingly. Or if at any time it appears that to sustain an action would be contrary to good morals or public policy, the court will not hesitate to dismiss it. The record in this cause upon an entire view of it, as well as the argument of counsel, presents the question whether the plaintiff can act as an administrator in Delaware.

It is not denied that the plaintiff in the state of its creation is clothed with the power to accept the office of an executor or administrator, and to perform all the duties incident to either trust; but the objection is made that the laws of Delaware regulating the granting of letters testamentary or of administration, while not expressly disqualifying or excluding a corporation, nowhere recognize that a corporation can be an administrator, and as the power to act in that representative character cannot be granted under the general statute to a domestic corporation, therefore a foreign corporation claiming to act under letters issued in another jurisdiction cannot be permitted to execute its power here or to bring an action in our courts. And it is further objected that in the absence of positive law a corporation is disqualified and incompetent at common law from being an executor or administrator.

To fully understand the extent and force of the first objection, it will be necessary to examine the statute. The law provides that the register of the county in which the deceased last resided, or of the county in which he had any real or personal estate, shall grant letters of administration to some one or more of the persons entitled to the residue of the personal estate; if none of those who are capable will accept, then to one or more of the creditors, and lastly, to any suitable person. *The first duty of the administrator is to take and sub-*

scribe an oath for the faithful performance of his duties, and then to give a bond to the state, with surety to be approved by the register, with the usual condition as to the inventory and appraisement of the goods and chattels, collecting debts due and paying claims against the estate, distributing the residue of the personalty according to law, and rendering a just and true account within a certain time. He is also required to make an affidavit verifying the inventory and list of debts in making his return to the register: Amended Code, c. 89, secs. 8 et seq. These provisions apply to the granting of original or domiciliary letters to the principal administrator of the deceased, who at the time of his death resided in the state or was possessed of property real or personal within its jurisdiction. But where the domicile of the deceased was in another state, and letters have been granted to an administrator in that jurisdiction, the law of this state has provided a very simple substitute for ancillary or subsidiary administration, so that the foreign administrator in most cases may proceed without any delay to take possession of the effects of the deceased and to collect the debts due to the estate. The law, in fact, recognizes the foreign administrator upon the mere production of his commission duly authenticated under the seal of the office or court by whom it was issued, and at once invests him with authority to represent the deceased in the same manner as if he had been originally appointed by a register in this state; and it is only upon the happening of certain contingencies that he will be compelled to take any proceedings of a public or judicial nature in order to confirm his authority.

These contingencies are pointed out in the same chapter, sections 46-48. "If the deceased be indebted to an inhabitant of this state in a sum not less than twenty dollars, the executor or administrator, before he shall recover judgment in court, shall cause such letters to be recorded in the register's office in one of the counties, and shall also, with sufficient surety or sureties, to be approved by the register, become bound to the state in a penalty double the best estimate of the personal estate of the deceased in this state, with condition to be void if he shall truly account for all the personal estate of the deceased in this state which shall come to his knowledge, and faithfully administer and distribute the same according to law." The court may stay proceedings in any action by such administrator, and any person in the state having any personal property of the deceased may refuse to pay or deliver

the same until the letters have been recorded and the security given, but a payment or delivery without such recording or security shall be good. A judgment shall not be reversed nor set aside as irregular on the ground that the recording and security have been omitted, unless the special objection shall have been made and overruled, but the court may stay the proceedings in the judgment until those requirements have been complied with. It will be observed that the foreign administrator may act by virtue of the original power granted to him, and without any additional warrant from a register in Delaware, and that it is only upon the refusal of a debtor or bailee to pay or deliver money or goods or chattels, or upon direct application to the court, that he is required to record his letters and give security. He is not obliged to take the oath of office, to make the affidavit verifying the inventory and appraisement, or even to return an account of his receipts and disbursements to the officer who approved his security. The statute leaves him to settle his accounts with the office or court which first appointed him, and, after the letters have been recorded and the security given, exercises no further control over him.

The question then to be determined in this branch of the case is, Does the statute prescribe any condition or duty which the plaintiff, being a corporation, cannot perform, and hence is unable to maintain its action?

There would be a difficulty, perhaps an insuperable one, in a corporation not being specially authorized by the laws of this state performing the conditions necessary to qualify it to take out original letters as administrator in its corporate name, namely, taking the oath and making the requisite affidavits; but in the present case no oath or affidavit is required, and the inquiry is brought down to the narrow point whether a corporation, constituted as the plaintiff is, with power to accept the office of administrator, can execute a valid bond, such as is prescribed by the statute. The negative of this proposition was insisted upon by the defendant's counsel, but both the principle and the authority of adjudged cases lead to an affirmative conclusion.

The law in relation to the power, duties, and responsibilities of corporations, public and private, has been much and frequently discussed of late years, both in the courts and by text-writers. Many doctrines which were once held to be *sound*, proving unsuited to the demands and usages of busi-

ness, have been overturned, while others, once considered as of doubtful or uncertain authority, have long since been accepted and settled as the law of the land.

It was laid down by Blackstone, and the notion prevailed for some time, that a corporation could not make a parol contract, and could speak and act only by its common seal: 1 Bla. Com. 474; but this technical rule of the common law soon gave way and vanished, and to-day a seal is no more necessary to render valid the acts and contracts of a corporation than of an individual, and in all cases where a natural person would be bound without a seal, a corporation would also be bound: 2 Kent's Com. 288. It was once questioned whether a corporation could maintain a suit beyond the jurisdiction in which it was incorporated, but Chancellor Kent, in 1820, in answer to such an objection, declared it to be well settled that foreign corporations could sue in their corporate name, and could prove as a matter of fact, if it was denied, that they were lawfully incorporated: *Silver Lake Bank v. North*, 4 Johns. Ch. 372. So, too, in regard to its liability to action, it has been held that it may be made a defendant in actions of *assumpsit*, trover, trespass, and for the publication of a libel, and even be indicted for malfeasance or non-feasance. As to its power of making contracts and the kind of obligations a corporation may enter into, there would seem to be little room for serious doubt in the light of the later authorities. A corporation, being created for a specific purpose, can make no contract forbidden by its charter, or in general any contract which is not necessary, either directly or incidentally, for the objects of its creation: Angell and Ames on Corporations, sec. 256. The exercise of the corporate franchise, which is the legislative grant of special privileges, cannot be extended beyond the letter and spirit of the act of incorporation; but the result of all the authorities is, that a corporation may by virtue of its implied powers, unless expressly or by necessary implication prohibited, make any contract, either as principal or surety, proper as the usual and ordinary means of carrying on its business under the circumstances under which it may be placed: *Id.*, sec. 258. In fine, a corporation has the power to do all things necessary to carry out the purposes for which it was incorporated, which are not in violation of positive law. When acting within the scope of the legislative purposes of its institution, all its contracts, whether sealed or unsealed, written or unwritten, are valid, and it has all the powers of

ordinary persons within that limit: *Brady v. Mayor of Brooklyn*, 1 Barb. 584. "It is a well-known principle," says Judge Thompson, in *Philadelphia and Sunbury R. R. Co. v. Lewes*, 33 Pa. St. 37, 75 Am. Dec. 574, "that a corporation, like a natural person, has a right to carry on its legitimate business by all legal and necessary means not prohibited by law." Every corporation has power to make all contracts that are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law, or the provisions of its charter: *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 80. The authorities are numerous on this point. In all the cases the difficulty, if any, was not in ascertaining the principle, but in applying it to a special state of facts. The question here is, Would the execution of the administration bond be within the implied powers of the plaintiff's charter? Its power to take the office and perform the functions of an administrator in the state of its corporate residence is clear and undisputed, and *ex comitate* it should be allowed to exercise the same office here, unless to permit it to do so would be in violation of some positive local law. No such law has been referred to, and it is believed that none such exists. Neither its charter nor any statute, expressly or by implication, prohibits it from making the bond, and the rule of law in such a case is, that when both the charter and statute are silent, it has power to make all such contracts as are necessary and usual in the course of business as means to enable it to attain the object for which it was created: *Angell and Ames on Corporations*, sec. 271. In *Dartmouth College v. Woodward*, 4 Wheat. 636, the court says: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

Secondly, it is objected that by the common law the plaintiff is not capable of being an administrator. Blackstone, among the disabilities of a corporation, includes its inability to be an executor or administrator, "for it cannot take an oath for the due execution of the office": 1 Bla. Com. 477. In *Bac. Abr.*, tit. Executors and Administrators, 2, the same doctrine is laid down on the same ground, but under a *semble*, and with these additional reasons: 1. Because corporations cannot be feoffees in trust for the use of others; and 2. Be-

cause they are a body framed for a special purpose. When the reason of a rule ceases, so does the rule itself. The plaintiff is not required to take an oath. It has been incorporated or "framed for the special purpose" of acting in the character and capacity in which it has come into court; and it is now well and long established that a corporation may be a trustee in the same manner as an individual, not only of real estate, but of personal property, to the same extent as private persons: Hill on Trustees, 48, and cases cited in the note. Says Toller: "It now seems settled that corporations can be executors, and that on their being so named they may appoint persons styled syndics, to receive administration with the will annexed, who are sworn like all other administrators. Such corporations as can take the oath of an executor are clearly competent,"—as, for instance, a corporation sole: Toller on Executors, 30. There is, then, no inherent disability or disqualification belonging to a corporation as such which excludes it from acting as an administrator, and it may accept the office if not prohibited by its charter, or forbidden by statute, whenever, from the objects of its incorporation and the nature of its business, it may become necessary and proper, and it is able to comply with the conditions prescribed by law as to giving bond, etc. Practically, the position of the plaintiff is meritorious and unobjectionable. With the express power contained in its charter to receive the appointment of administrator, and with its capital stock pledged as the security required for the faithful performance of its duties, it brings an action in its representative capacity for the recovery of a debt due to its intestate, and is met at the outset by technical rules which, whatever may have been the reason of their origin and adoption, have either become obsolete or have been so modified and relaxed as to be no longer of general application. The execution of the bond would, at the best, amount to little more than a form, and be without substantial benefit or necessity; but still the defendant is entitled to it, if it is insisted upon, and the plaintiff has a full and lawful power to execute it, as it would have to make or indorse a promissory note, or accept a bill of exchange, or to execute any other description of bond which may be fairly and legitimately considered as necessary and proper in the usual course of its business. It has not been made to appear in what manner the interests of this state or of its citizens would be impaired, or in what way its policy would be invaded or subverted, by

sustaining the plaintiff's action. Admitting that a corporation may be unable to act as an original administrator under the provisions of the general statute, it does not follow that it may not be recognized as a foreign administrator on the production of letters duly authenticated and giving bond. The word "persons" may extend to and include bodies corporate and politic as well as individuals: Amended Code, c. 5. If the plaintiff can give the bond, it does all that the law requires. The rights of our citizens will not be endangered, their property rendered less secure, or the dignity of the state be diminished. If the policy of the state is to be inferred from the history of its legislation, the act of the general assembly of Delaware of April 9, 1873, incorporating a company for the special purpose, among others, of acting as administrator, would be conclusive of that question: 14 Del. Laws, 714. In *Bank of Augusta v. Earle*, 13 Pet. 585, cited by counsel on both sides, Chief Justice Taney, in the course of a learned and elaborate opinion, says: "When a court is called on to declare contracts . . . to be void on the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct to justify the court in sustaining the defense. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests, and is not supported by positive legislation." The point made in connection with this, that a corporation can have no legal existence outside of the sovereignty by which it is created, is not supported by argument or authority. The general principle is, that a corporation created in one state can make no valid contract in another without the latter's sanction, express or implied; but it has been repeatedly decided that not only can a corporation make a contract in other states, but may be sued by service on its agencies in other jurisdictions. It has already been shown that it can sue in another state.

The great rule in the settlement of estates is, that the personal property is distributed by the law of the domicile, and that prevails where it does not conflict with the *lex rei sitæ*. To ascertain the existence of such conflict is not difficult. When a statute or the unwritten or common law of the state forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, Which of the conflicting laws is to have effect? Gen-

erally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*. And courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens: Bouv. Law Dict., tit. Comity. Chief Justice Waite, in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 17 Alb. L. J. 306, states the law on this subject briefly and clearly: "Upon principles of comity, the corporations of one state are permitted to do business in another, unless it conflicts with the law or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity, individual citizens cannot complain. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn": Story's Conflict of Laws, 36, 37.

The law of ancillary administration is founded on the duty of every government to protect its own citizens in the enjoyment of their own property and the recovery of their debts, at the same time having due respect to the rights of foreign creditors. When the estate of a deceased person is solvent, there is no difficulty in applying its assets, and it is only in cases of insolvency that any question can arise as to the order of payment of debts, and in such cases the law of the *situs* prevails over the law of the domicile. But that question has not been made here, there being no intimation that the estate which the plaintiff represents is not fully able to meet all lawful claims against it. The sole inquiry is as to the incidental or implied power of the plaintiff to comply with the requirements of the statute by giving the bond. This power it has, and, as there is no positive law, or definite and known state policy to prohibit or forbid its exercise of the duties of an administrator, there is no reason why it should not be allowed to maintain this action.

SAULSBURY, C., concurred.

WOOTTEN, J., dissented.

FOREIGN EXECUTOR WHO COMES INTO CONNECTICUT TO RESIDE, bringing with him a portion of his testator's estate, cannot be made liable there at the suit of a creditor of the testator, even to the extent of property so removed: *Hedenburg v. Hedenburg*, 33 Am. Rep. 10.

ASSIGNEE OF FOREIGN EXECUTOR. — An action may be brought in Iowa by assignee of foreign executor, although there has been no probate or administration in Iowa: *Campbell v. Brown*, 52 Am. Rep. 446. Foreign administrator cannot maintain an action in Kansas for the negligent killing of his intestate, where he cannot maintain such an action under the law of the state of his appointment: *Limekiller v. Hannibal and St. Joseph R. R. Co.*, 52 Id. 523. Foreign administrator cannot sell to strangers a mortgage on real property in Michigan owned by the deceased, who died in another state, when the estate of said deceased is in course of regular and valid administration in Michigan.

ACTION BY FOREIGN EXECUTOR. — An executor appointed in Texas may maintain an action in California, in his own name, upon a judgment recovered by him as such executor in Texas: *Lewis v. Adams*, 59 Am. Rep. 423. Administratrix of an estate appointed in Colorado, where intestate died while temporarily sojourning there, cannot bring an action in Kansas on notes given by parties domiciled in Kansas secured by mortgage on land situated there: *Moore v. Jordan*, 59 Id. 550.

EXECUTOR OF FOREIGN WILL, ACTION AGAINST. — Legatee under a foreign will may maintain an action to recover legacy against executor who has qualified in place of domicile of testator and in this state, there being sufficient assets in this state to pay legacy: *Graveley v. Graveley*, 60 Am. Rep. 478; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 8 Id. 626.

EXECUTOR OR ADMINISTRATOR HAS NO AUTHORITY TO GO INTO FOREIGN TERRITORY and exercise his official functions over property there: *Molynaux v. Seymour, Fanning, & Co.*, 76 Am. Dec. 668, note.

COMITY. — Foreign corporation invokes the comity of the state for the transaction of its business, and must submit to the laws of such state relative to foreign corporations: *Hampeon v. Weare*, 66 Am. Dec. 121, note.

CORPORATION MAY ACT IN FOREIGN STATE, and upon being recognized there may by its agents make any contracts within its limited powers which are not prohibited by the foreign state: *Ohio Life Insurance Co. v. Merchants' Insurance and Trust Co.*, 53 Am. Dec. 742.

RIGHT OF CORPORATION OF ONE STATE TO EXERCISE ITS CORPORATE POWERS WITHIN ANOTHER STATE is dependent upon the will of the state in which the exercise of such right is attempted: *Commonwealth v. Milton*, 54 Am. Dec. 522.

CORPORATION KEEPING WITHIN SCOPE OF THEIR GENERAL POWERS, and having authority by the laws of their creation to make certain contracts, may do so in foreign governments, if such contracts are not prohibited by the laws of such governments: *Blair v. Perpetual Insurance Co.*, 47 Am. Dec. 129.

CORPORATION OF SISTER STATE MAY MAINTAIN SUITS IN COURTS OF THIS STATE; in this respect there is no difference between natural and artificial persons: *Lathrop v. Commercial Bank*, 33 Am. Dec. 481.

FOREIGN CORPORATION — TRUSTEE. — New York corporation, authorized by its charter to hold real estate and to act as trustee, appointed by a New York court trustee, under the will of a citizen of that state, has no power to hold real estate of the testator in Illinois: *United States Trust Co. v. Lee*, 24 Am. Rep. 236.

FOREIGN CORPORATION, POWERS OF. — Every power which a corporation exercises in a state other than the one where created depends for its validity upon the laws of that state: *Phœnix Insurance Co. v. Commonwealth*, 96 Am. Dec. 331, and note. In Massachusetts, foreign corporation may make contracts within scope of its charter, and may sue and be sued thereon: *Folger v. Columbian Insurance Co.*, 96 Id. 747. Circumstances under which foreign corporation may make valid contracts and may sue and be sued: Id., note 754. Foreign corporation is recognized in foreign jurisdiction, not as act of right, but as an act of grace; and a state may refuse to recognise a foreign corporation except upon its own conditions: *Erie Railroad Co. v. State*, 86 Id. 226, note 240. Corporation of another state, having there obtained a judgment against another corporation of that state, may maintain a suit for discovery against the officers of such other corporation in this state: *Post v. Toledo etc. R. R. Co.*, 59 Am. Rep. 86.

CORPORATIONS MAY NOW HOLD AS TRUSTEES: *Commissioners of the Sinking Fund v. Walker*, 38 Am. Dec. 433.

CORPORATIONS AS TRUSTEES. — Corporations, unless specially authorized, cannot be seized of lands to the use of another: *Greene v. Dennis*, 16 Am. Dec. 58.

RULE OF COMITY DOES NOT REQUIRE COURTS OF ONE STATE to enforce the law of another, where the law of the latter state clashes with the rights of the citizens of the former, or with the policy of its laws: *Kanaga v. Taylor*, 70 Am. Dec. 62; *McLean v. Hardin*, 69 Id. 740, and note 743; *Walkers and Walker v. Whitlock*, 76 Id. 607. Comity between states, so far as rights, privileges, and immunities are not guaranteed by the federal constitution, cannot be urged as against the laws and policy of the state where it is invoked: *Donovan v. Pitcher*, 25 Am. Rep. 634.

PAYMENT VOLUNTARILY MADE TO FOREIGN ADMINISTRATOR by debtors of deceased are held effectual in the courts of New York on principles of national comity: *Peteresen v. Chemical Bank*, 88 Am. Dec. 298, note 308.

COOCH'S EXECUTOR v. COOCH'S ADMINISTRATOR.

[5 HOUSTON, 540.]

PERSONAL ESTATE OF TESTATOR IS PRIMARILY CHARGEABLE with the payment of his debts and legacies, and with the payment of liens on his real estate.

LEGACIES OF SPECIFIC NATURE are paid before general ones.

REQUEST OF "ALL MY PERSONAL ESTATE" means the balance of personal estate after the payment therefrom of testator's debts, and other legal charges.

SPECIFIC LEGACIES ARE SUCH ONLY AS DESIGNATE PARTICULAR THINGS, or things by a particular description.

REQUEST OF ALL A MAN'S PERSONAL PROPERTY is not a specific legacy. Its import is the same as is expressed by the words, "resid and residue."

OLD RULE THAT PERSONAL PROPERTY MUST FIRST BE EXHAUSTED in the payment of testator's debts is not changed by our system of settlement of estates, under which all testator's property, real as well as personal, is responsible for such payment.

AM. ST. REP., VOL. I. — 11

REAL ESTATE IS NEVER CHARGED WITH PAYMENT OF DEBTS AND LEGACIES while there is personal property remaining, unless such an intention, together with a direction that the personalty be exempt, is expressly declared, or may be fairly inferred from the language of the will.

SPECIFIC BEQUEST OF PERSONAL PROPERTY is subject to payment of testator's debts, unless his realty is charged with their payment.

ACTION for the construction of a will by the executor of Tamar Cooch, deceased, against the administrator *cum testamento annexo* of William Cooch, deceased.

Patterson, for the appellant.

Gray, for the respondents.

By Court, COMEGYS, C. J. The controversy between the parties in this case arose out of the will of William Cooch (the husband of the appellant's testatrix), which is in these words:—

"In the name of God, amen. I, William Cooch, of Pencador Hundred, New Castle County, and state of Delaware, being of sound and disposing mind and memory, do make and declare this to be my last will and testament, hereby revoking all former wills heretofore made by me.

"Item 1. It is my desire and wish that my executor, hereafter named, shall pay all my just debts and funeral expenses as soon after my decease as possible.

"Item 2. I give, devise, and bequeath to my beloved wife, Tamar, all my personal property, and three thousand five hundred dollars in cash out of my real estate, as soon as sold by my executor.

"Item 3. I devise, give, and bequeath to Dillon Hutchison the sum of five hundred dollars.

"Item 4. I devise, give, and bequeath to my brothers Zebulon H. Cooch and Levi G. Cooch the balance of my estate, to be divided between them, share and share alike.

"It is my desire and wish that my executor, hereinafter named, shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or deeds for the same.

"I do hereby nominate and appoint my brother, Levi G. Cooch, to be my executor of this my last will and testament.

"In witness whereof," etc.

The appellant conceived his testatrix to be entitled under this will to all the personal estate of her husband, without any deduction therefrom whatsoever; and the respondents, not

admitting such claim, the bill which forms part of the record before us was brought to determine that question. The case presented by it having been so conducted on both sides as to require of the chancellor a decision of the matter in controversy, he made it on the twenty-first day of February last, denying the claim of the complainant in his court. From that decision this appeal was taken, and we have been favored by the chancellor, in the opinion expressed by him in the cause, and now read to us, with the reason or grounds upon which he based his decree. Such reasons are full and lucid; and we proceed to give our views of the law by which this court is to decide whether they are sufficient or not in our judgment.

There are certain well-established and reasonable rules which serve as a sure guide to courts in the decision of such questions as that presented by the record in this case, and which are by no means new, but are so old as to have become venerable landmarks of equity decisions in cases of this nature under wills. They are those for the administration of the estates of all testators, and have so long prevailed as to be entitled to the appellation of maxims. They are as follows: 1. The personal estate of a testator is the primary fund for the payment of his debts, and of such legacies as he may choose to give; 2. In the payment of legacies those of a specific nature are to be paid before general ones; 3. The real estate is not liable for the payment of either debts or legacies, unless the testator has unequivocally so declared in his will.

With respect to this rule we may now say, as we shall repeat hereafter, that in this state all the property of a testator is subject to the payment of his debts, but the real is only to be resorted to for that purpose, even in the case of liens upon it, after and not until the personal estate has been exhausted, which still preserves the rule that the personal estate is the primary fund for the payment of a testator's debts. Of course we are not to be understood as speaking of liens which the creditor proceeds to enforce.

We did not understand the learned solicitor for Tamar Cooch's executor to make any contention with the respondents upon this view of the law, but he did insist, and exhibited his usual industry in collecting and citing authorities to sustain his view, that according to the true legal construction of the will of her husband, her executor is entitled to the whole personal estate of the testator, and that by force of the terms used

by him all his debts, funeral charges, and expenses of administration are thrown upon the proceeds of the sale of the real estate, which is substituted in lieu of the personal for the payment and discharge of them; and he founds or places his argument or contention upon the express words of the second item of the testator's will: "I give, devise, and bequeath to my beloved wife, Tamar, all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor."

If the question presented by the solicitor for the appellant had never been decided, we might possibly take the view of it submitted by him, and conclude that the chancellor erred, and that the appellant could claim the whole personalty of the testator, and that such claim should be allowed; but such question has been passed upon and determined over and over again by courts of equity, whose concern it is chiefly to interpret wills; and never, in cases having no special features more than this case has, has it been decided otherwise than that the personal estate must first be applied to the payment of debts before resort can be had to the real estate. The very words used in this case, "all my personal estate," have, in the numerous instances produced by the learned solicitor for the appellees in his forcible argument in their behalf, undergone the most critical and exhaustive examination that minds of the highest order of legal acumen could give to them, and they have always (where there were no expressions in the will that required a different construction) been held to mean simply the balance of the personal estate that should be left after the payment of the debts of the testator and other legal charges, such as those of burial and of administration. We are not aware of any cases in contravention of this view, or that would justify us, as a court of review, in departing from the old accustomed pathway of the law. In looking through this whole case, with the will of William Cooch and all its provisions or clauses in our mind, we do not see how we can do otherwise than confirm and establish the chancellor's decree.

A case in some respects similar to the present (though there were many different circumstances or facts in it) came before this court, and was decided at the June term, 1872. It was that of *Morris v. Morris's Ex'r*, 4 Houst. 414, involving the construction of Elijah Morris's will. While the expression in it is not the same exactly as that in Cooch's will, yet the question was so much the same that the court felt called upon,

and properly, to express its opinion in language involving the very considerations this case requires. His honor Judge Wootten, in the judgment of the court then declared, and speaking the sense of all its members, said the import of the words "balance of my whole estate, after deducting the afore-said legacies," being in question, "this cannot mean the whole original estate, but it is the residue remaining after the payment of the debts; that residue is what constitutes a man's estate; and when we speak of our own or another's estate, we mean that which remains clear for distribution after the payment of debts. Whatever is necessary for the payment of a deceased man's debts belongs to his creditors, and cannot properly be considered any part of his estate for distribution, and especially when we apply the act of distribution; for no matter how much property he may have in possession, if it is not more than sufficient to pay his debts, he has no distributive estate. This is true, not only in a common-sense view, but in legal contemplation." We not only feel ourselves bound by the words of the court, spoken by its organ for that case, but independently we decide that there is nothing in the will of William Cooch that would justify us in reversing the decree of the chancellor, which, to say nothing of its sufficient reasoning, is strictly in accord with the law as we take it to be.

In this case there is no question between legatees; it is simply one between the devisees, in effect, of the real estate, and the legatee of the personal; and we have been unable to find any case, nor has the learned solicitor for the appellant furnished us with any, which decides that the words, "all my personal estate," in a will like that before us, have been held to cast the payment of debts, expenses of administration, and legacies upon the realty. Much stress was laid by him upon the fact (which he assumed) that the bequest to the widow was specific; but we do not agree with him that it was specific in any legal sense, although it was of all, etc. A legacy is only specific when it designates a particular thing or things by specific description, as my bay mare, my gold watch, my shares of stock in such a bank, or the like; or mentions some place where the thing itself can be found, as my bank notes in a certain drawer; or indicates some part of the personal estate consisting of various articles which can be easily distinguished and set apart from the residue, as all my personal property in a certain room, house, hundred, county,

etc. Cases of a similar kind will be found referred to in part 2 of Redfield on Wills, 475, where will also be found authority for the principle that a bequest of all a man's personal property is not a specific legacy. Where it is of all merely, indicating no locality or more particular specification, it is general, the same as is imported by the words "rest" and "residue," because such word means what every testator must be taken to know, — the balance after payment of debts, etc., — the law being that the personal estate must first be exhausted before resort can be had for such payment to the realty. Every testator is presumed to know the law with respect to the liability of his estate for his debts, and consequently to make disposition of it in accordance with such knowledge. Therefore it is that where a testator even uses such sweeping and apparently conclusive words in disposing of his personalty as "all my personal estate" the law still holds that he only meant such portion of it as should be left after taking from it all that it was liable to, either as matter of legal responsibility for debts, funeral expenses, and charges of administration, or on account of some further deduction which the provisions of his will requires, — for example, a specific legacy. The authorities are abundant upon this point, and were fully laid before us in the argument in June last; it is unnecessary to recite them here. And further, there is, in our opinion, no warrant for the position assumed by the learned solicitor for the appellant that this bequest is specific. We have before given examples of specific legacies; we now refer to authorities in like cases of specification: *Sayer v. Sayer*, 2 Vern. 688; Prec. Ch. 392; Gilb. Ex. Rep. 87; *Green v. Symonds*, 1 Bro. C. C. 129, in notes; *Moore v. Moore*, 1 Id. 127; *Gayre v. Gayre*, 2 Vern. 538; *Shaftsbury v. Shaftsbury*, 2 Id. 747; *Land v. Devaynes*, 4 Bro. C. C. 537; *Clarke v. Butler*, 1 Mer. 304. The principle is the severance of the particular property from the great body of the estate, and the specific gift of it to the legatee: 1 Roper on Legacies, 243. Where there are no such restrictive expressions, a legacy of personal estate generally will be general, and not specific; and even the circumstance that the real and personal estates are blended together will make no difference, although as to the former the devise must necessarily be specific: Id.; 2 Williams on Executors, 849.

But of course the case is different when a testator exonerates his personal estate from the payment of his debts, and

casts that burden upon his realty. Whenever that occurs, the primary liability is transferred from the personal and thrown upon the real, and the latter is the source to which the executor must first apply. There is no doubt of that. When the intention of a testator to create a new fund for the payment of his debts appears plain, that fund must first be resorted to if he has so expressed himself. But before that is taken as a fact, there must be no doubt left upon the face of the will; it must plainly appear by it that the testator so meant. This is not to be settled by conjecture or mere inference, but is to be shown by unequivocal language or expressions contained in the paper itself. There must be something the courts will recognize as sufficient for that purpose to justify them in departing from the old, established, certain rule, that the primary fund for payment of debts is a testator's personal estate. And our system of settlement of estates, under which all a man's property, as well real as personal, is responsible for his debts, does not affect the rule; for the primary liability is still on the latter, and there remains until it is exhausted. In England, the real estate was not liable for simple contract debts at all unless made so by a testator; but here it has always been otherwise, and the law as uniform as it is now. But notwithstanding the difference, the first fund to be taken has always been the personal, the real being merely auxiliary or secondary.

Now, in looking through the will that forms part of the record before us, we do not find any clause, word, or expression that would allow us to depart (if we were inclined to do so) from the established line of decisions upon questions such as are by that record presented to us. There is certainly nothing said about exempting the personal estate from the payment of the testator's debts, nor is any language used that can fairly be construed as favoring the notion of such an intent. There is not even any charge of the real estate with them, though that by itself would mean nothing more than that they should be paid at all events. Nor does the testator direct that, to insure the payment of his debts, his real estate should be turned into money, and made part of the personal. If he had gone as far as that even, still the first fund to be taken would be personalty; as, by a well-known rule, the residue of such real estate, after such charge upon or with respect to it had been liquidated, would descend to the heir or pass to the devisee *qua* realty, he having the right to redeem it

from sale, and take it as heir or devisee, according as it may have been undevisee or devisee.

But, in reality, the will itself negatives the idea that the land of William Cooch was devoted by him as the first fund for the payment of his debts. The language of the first item is, that the executor shall pay all the just debts and funeral expenses of the testator as soon after his decease as possible and in the second paragraph of the fourth item, he expresses his desire and wish that his real estate shall be sold within a year from the time of his death, thus allowing the executor a full year to find an advantageous period to offer his land for sale. If anything could be wanting to furnish us with assurance that the conclusion we are about to announce is the correct one, these clauses would be sufficient to do it. The testator evidently contemplated that his personal estate should be at once, in the usual course, converted into money to satisfy his creditors, and his land in a reasonable time to raise the money to be paid out of it.

The question is, Did William Cooch, by his will, intend that his real estate should be resorted to before his personal in the settlement of his estate? As we do not find in that will any language that requires of us to say that he did, the bequest to his wife being a general and not a specific legacy, and that bequest alone being the source to which we have been referred and must resort for such a conclusion, and the two clauses of the will we have just referred to being, as we think, at variance with the idea of substitution, we are of opinion and decide that the decree of the chancellor in the court below was right, and should be affirmed.

WALES, J. The general rule is well settled that, in the absence of express words or manifest intent of the testator, his personal estate is primarily liable for the payment of his debts: *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Samwell v. Wake*, 1 Id. 145; *Dick*, 597; *Walker v. Jackson*, 2 Atk. 625; *Tait v. Lord Northwick*, 4 Ves. 824. The doctrine is clearly stated by Sir William Grant, in *Hancox v. Abbey*, 11 Id. 186, as being perfectly established, that in order to exonerate the personal estate there must be either express words or a plain intention. Precise and specific words of exemption are not necessary, but it is sufficient if the intention can be collected from the whole will to give the personal estate exemption from the debts. Mr. *Jarman*, in his treatise on wills, after a full discussion of the

authorities, remarks: "These cases seem to authorize the proposition that whenever the personal estate is bequeathed in terms as a whole, and not as a residue, and the debts, funeral, and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation": 2 Jarman on Wills, 586. This rule, and the principles on which it is founded, have been fully recognized and accepted by the courts in this country: 1 Story's Eq. Jur., secs. 572, 573; *Lupton v. Lupton*, 2 Johns. Ch. 623; *Walker's Estate*, 3 Rawle, 229. In England, real estate is not liable for the payment of simple contract debts. Here that estate is subject to the demands of all the creditors of the deceased, but not until the personal estate has been exhausted, when it becomes the auxiliary fund for the payment of debts. Hence the doctrine of the English courts of equity has been adopted, that not only must the testator charge his lands with the payment of his debts, but must also show his intention to exempt the personalty. If the personal estate has been specifically bequeathed, and the lands directed to be sold for the payment of debts, the personal is held to be exempted by necessary implication. But the testator is always presumed to act upon the legal doctrine that the personal estate is the natural and primary fund for the payment of all debts until he shows some other distinct or unequivocal intention. In *Lupton v. Lupton*, 2 Johns. Ch. 623, Chancellor Kent states the rule broadly, and as not admitting of dispute, that the real estate is not as of course charged with payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and dispositions of the will. It is not sufficient that debts or legacies are directed to be paid,—that alone does not create the charge,—but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. Where there is an express bequest of all the testator's personal estate (with or without an enumeration of particular articles), and the will also contains a charge of debts upon the real estate, these facts have sometimes been held to favor the exemption of the personalty. But the position is nowhere sustained that a specific bequest of the personal estate, without a charge on the lands for the payment of debts, will exonerate the former: Hill on Trustees, 352; 1 Lead. Cas. Eq. 918.

Applying these rules of construction to the interpretation of

Mr. Cooch's will, in which are no express words of exemption, resort must be had to the intention of the testator in order to ascertain what was his wish in respect to the payment of his debts. The first item contains the general and usual direction to his executor to pay his debts and funeral expenses. By the second, he bequeaths to his wife "all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor." By the third, he gives to D. Hutchison five hundred dollars. By the fourth, he gives to his brothers "the balance of my estate to be divided between them, share and share alike." Finally, he empowers his executor to sell his real estate at public sale within one year after his decease. The question is, What does the testator mean by "the balance of my estate"? Do these words signify what may remain or be left after all the personal property has been given to the wife, and the debts and legacy to Hutchison have been paid out of the proceeds of the sale of the land? And is the inference plain from the context of the whole will that the intention is to cast the burden of the debts upon the real estate? It would be begging the question to say that the inquiry suggests a doubt, and there is therefore no plain declaration or manifest intent to change the legal order of payment.

It cannot be denied that in the expressions and terms of this will there is room for conjecture that the testator may have desired to leave to his wife all his personal property free and discharged from the payment of his debts, but there is no plain declaration or manifest intent to that effect. He neither discharges the personal nor charges the real estate, and he is, in the language of Judge Story, presumed to act upon the legal doctrine that his personal estate is the natural and primary fund for the payment of his debts until some other distinct and unequivocal intention be shown. The object in selling the real estate appears to have been to secure the cash payment of thirty-five hundred dollars to his wife, and the division of "the balance" of the proceeds of such sale between his two brothers. This was the purpose of the conversion of the real estate, and in this respect it differs from the case of *Sharpley v. Forwood's Ex'rs*, 4 Harr. 336, where the court held that if there be no direction as to the object of the conversion, and the land is directed to be sold, it is a change, out and out, of the realty. Here there is a special direction to pay the wife three thousand five hundred dollars out of the real fund, and

to divide the balance between the brothers. There is, then, no fair or satisfactory inference to be drawn from the context that Mr. Cooch intended to exonerate his personal estate. As was said by the master of the rolls in *Brydges v. Phillips*, 6 Ves. 570, it is only a probable conjecture. There is no certainty, no clear, unambiguous intention to be collected from the whole will, that he meant that. There is no ground upon which to judicially collect a settled intention. The word "all" prefixed to "my personal estate" is not sufficient to make a specific legacy, which is of a particular and individual character, precisely described and limited as to its nature, value, or the place where it may be found. But admitting the legacy to the wife to be a specific one, the debts must still be paid out of the personalty, unless there is at the same time an express charge on the realty for that purpose, or an evident intention to make the charge. A testator must comply with the rules of construction and the settled principles of law, which have been established, as well to carry out his intention, where it is consistent with them, as to administer the estates of deceased persons, according to a fixed and regular order. Looking at the will alone, and extracting its meaning by intrinsic evidence, there is wanting that clear, unequivocal, and manifest intent which is required to exempt the natural and primary fund, and to throw the burden upon the real estate.

ESTATE OF DECEASED PERSON VESTS IN HIS HEIRS, subject to the expenditure by his executor or administrator of amount necessary to pay his debts: *Chambers's Adm'r v. Wright's Heirs*, 93 Am. Dec. 311.

LEGAL TITLE TO DECEDENT'S LANDS DECENDS TO AND VESTS IN HIS HEIRS AT LAW; but under the statutes of Arkansas such lands are assets in the hands of his executor or administrator: *Carnall v. Wilson*, 76 Am. Dec. 351, and note 357. Where deed is made to certain persons described therein as "heirs and legal representatives of John Sage, deceased," the grantees take such land in their representative capacity, and subject to payment of debts of decedent: *Sage v. McCallister*, 67 Id. 689.

REAL ESTATE IS NOT MERELY SECONDARY FUND FOR PAYMENT OF DECEDENT'S DEBTS. His real and personal estate are equally liable. Act of 5 Geo. II., c. 7, sec. 4, subjecting decedent's whole estate, both real and personal, to payment of his debts, was by act of Congress the law of the District of Columbia from and after June 24, 1812: *Suckley's Adm'r v. Rotchford*, 65 Am. Dec. 240.

PERSONAL ESTATE OF DECEDENT PRINCIPALLY LIABLE FOR PAYMENT OF DEBTS: *Suckley's Adm'r v. Rotchford*, 65 Am. Dec. 240, note 247.

EXECUTOR OR ADMINISTRATOR, AT COMMON LAW, could not sell real estate of deceased for the payment of his debts, unless it was expressly charged for that purpose: *Ticknor v. Harris*, 40 Am. Dec. 186. Property in hands of

heirs, devisees, or aliens, may be reached for payment of decedent's debts: *Id.*, note 193.

REAL ESTATE IS NOT CHARGEABLE WITH PAYMENT OF LEGACIES unless such an intention is expressed by testator: *Knotts v. Bailey*, 28 Am. Rep. 343. Future vested interests may, by proceedings in equity, be subjected to payment of decedent's debts: *May v. May*, 63 Am. Dec. 431. At common law, personal estate of intestate remained in abeyance until the appointment of his personal representative, when it vested absolutely in him: *Ansley v. Baker*, 65 Id. 136, and note 140. Where devisee of real estate is appointed executor, and is expressly directed to pay legacies, such direction is sufficient to create a charge on such real estate for the payment of said legacies: *Thayer v. Finnegan*, 45 Am. Rep. 285. Circumstances under which, by statute, a sale of testator's lands is authorized for the payment of his debts: *Mooley v. Tutthill*, 6 Id. 710. A general or residuary devise of lands, "after the payment of legacies," charges those lands with the payment of legacies, but such lands are not subject to the payment of a specific devise in a former clause of the will to which particular conditions are annexed, though the devisee is also nominated as executor: *Newson v. Thornton*, 60 Id. 743. Bequest of the "balance of my real estate," held a specific bequest: *Henderson v. Green*, 11 Id. 149.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

KURTZ *v.* STATE.

[22 FLORIDA, 36.]

FUGITIVES FROM JUSTICE—CONSTITUTIONALITY OF STATE LAW.—The state statute of the 17th of February, 1881, authorizing arrest and detention of fugitives from justice, does not conflict with section 2, article 4, of the constitution of the United States, or with sections 5278 and 5279 of the Revised Statutes thereof.

FUGITIVE FROM JUSTICE.—Either the original affidavit, or a copy thereof duly certified as authentic by the governor of the state whence the fugitive has fled, is sufficient to authorize the action of the governor of the state where the fugitive is found. Alleged fugitive from justice cannot impeach the validity of the affidavit upon which the requisition is based, if it distinctly charge the commission of an offense.

FUGITIVE FROM JUSTICE.—Governor of the requesting state is the only judge of the authenticity of the affidavit.

CERTIFICATE, THAT AFFIDAVIT UPON WHICH REQUISITION for fugitive from justice is founded "is duly authenticated according to the laws of said state," is sufficient.

"MAGISTRATE."—This word in section 5278, Revised Statutes, relating to fugitives from justice, includes an assistant police magistrate of a city.

MAGISTRATE IS JUDICIAL OFFICER having summary jurisdiction in matters of criminal or *quasi* criminal nature. Justices of the peace, police justices, and American consuls in foreign ports are magistrates.

RES ADJUDICATA DOES NOT APPLY TO JUDGMENTS ON *habeas corpus* in cases of extradition.

IN HABEAS CORPUS PROCEEDINGS IN EXTRADITION CASES, the merits of the case cannot be considered. The only subjects of inquiry are the sufficiency of the papers and the identity of the prisoner.

HABEAS CORPUS on extradition warrant. Writ of error to the circuit court for Duval County. Michael Kurtz was ar-

rested as a fugitive from justice from the state of New York, on January 19 and 29, 1886, and from both arrests was discharged on *habeas corpus*. He was rearrested January 30, 1886, and on the same day sued out another writ of *habeas corpus*, returnable on the 1st of February. To this writ the sheriff made return that Kurtz was in his custody under a commitment issued by Marcy, a justice of the peace of Duval County, on the same day. The judge then ordered the prisoner to be remanded to the custody of the sheriff pending the arrival of extradition papers. The sheriff made further return on the eighth day of February that he held the prisoner under a warrant issued on the 2d of February by the governor of the state of Florida, directing him to arrest Kurtz and deliver him to the representative of the state of New York. Kurtz was remanded, to be dealt with in pursuance of the governor's warrant, and he then prosecuted this writ of error. The statute under which the prisoner was sought to be held, and the validity of which his counsel assailed, is as follows: Section 1. Upon an affidavit made before any judge or justice of the peace of this state, that any person within the territorial jurisdiction of such judge or justice is a fugitive from justice from another state, specifying the state from which such person is a fugitive, and the crime with which he is charged, when and where committed, and that there is a warrant for his arrest issued by a competent court of the state from which he has fled, such judge or justice of the peace may issue a warrant for the arrest of the alleged fugitive, who, when arrested, shall be brought at once before the judge or justice issuing the warrant, or before some other judge or justice having jurisdiction in the premises, and examined, and if, upon such examination, there is found to be probable cause to justify the detention of the alleged fugitive he may be committed by the judge or justice for a period of time not to exceed ten days, to await the warrant for the extradition of the alleged fugitive; but if, upon such examination, there is not found probable cause to justify the commitment of the alleged fugitive as aforesaid, he shall be at once discharged from custody. Sec. 2. No judge, justice of the peace, sheriff, constable, or other officer, shall be obliged to take any action in or about the arrest and detention of such alleged fugitive from justice, nor shall any sheriff or jailer be obliged to receive or keep in custody such alleged fugitive without prepayment of the costs to which the officer of whom the service is demanded shall be entitled, and in

case of the sheriff or jailer, upon the commitment of such alleged fugitive from justice, the prepayment of the jail fees, including the cost of feeding the prisoner, and all such fees and costs, shall be the same as are or may be provided for by law in like cases, and neither the state of Florida nor any county thereof shall be responsible or liable for any costs or expenses in the premises.

F. W. Pope and O. J. Summers, for the plaintiff.

Charles M. Cooper, attorney-general, *Call and Jones*, *A. W. Owens*, and *Randall, Walker, and Foster*, for the defendant in error.

By Court, McWHORTER, C. J. The first question brought to our attention is the constitutionality of the act of February 17, 1881, entitled "An act relating to the arrest of fugitives from justice from other states." It is insisted by the counsel for plaintiff in error that this act is repugnant to the constitution of the United States, for the reason that it is legislation by a state on a subject-matter that was exclusively delegated by the constitution to Congress, and that Congress had legislated thereon. We find no support of this proposition in the adjudged cases, except a *dictum* of Justice Story in the case of *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539. The question before the court was the constitutionality of the act of the state of Pennsylvania of March 26, 1826, making it a penal offense to carry away from the state fugitive slaves by force and violence, and did not involve the question under consideration here, and all reference to it might have been omitted: *Spear on Extradition*, 245. The constitution, in article 4, section 2, provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Neither the act of Congress nor the constitution of the United States relate in any way to fugitives from justice from one state to another, or makes any provision concerning them until a demand has been made for their delivery. "The demand is evidently the initial point at which the constitution and the law begin to operate, and prior to this neither has any application to the case": *Id.* While legislation by a state against the constitution and the law of Congress, impair-

ing the full operation of their provisions, would be nugatory, yet it is competent for a state legislature to enact laws on the subject at a stage prior to that which the constitution and federal laws have designated as the time at which they take cognizance of it, provided that such enactments are not inconsistent with the end named in the constitution. Chief Justice Shaw, in *Commonwealth v. Tracy*, 5 Met. 536, in considering the constitutionality of a similar act in view of the doctrine stated in *Prigg v. Commonwealth*, *supra*, used the following language: "It is a provision obviously not repugnant to the constitution and laws of the United States, nor tending to impair the rights or relax the duties intended to be secured by them. To this extent, therefore, the court are of opinion that this law is constitutional and valid,—one that the legislature had the authority to pass": See also *Ex parte Rosenblatt*, 51 Cal. 285. In this case it is held by the court that such legislation is based on principles of comity. Mr. Hurd, in his work on *habeas corpus*, page 636, says that "legislation of this character when in no sense opposed to the law of Congress may be vested in the general police power of the states": *Commonwealth v. Hall*, 75 Mass. 262; 9 Gray, 262; *Robinson v. Flanders*, 29 Ind. 10; *Ex parte Cubreth*, 49 Cal. 436; *Ex parte Ammons*, 34 Ohio St. 518.

It is insisted by the counsel for the state that the governor could rightfully withhold the papers upon which he based his warrant for the arrest of the prisoner. It is unnecessary to consider this question, as the record shows that the requisition from the governor of New York, and the accompanying papers, constituted the evidence upon which he acted, and were submitted to the court: *Ex parte Reggell*, 114 U. S. 642.

The questions the record presents for our determination are,—1. Is Michael Kurtz charged with the commission of treason, felony, or other crime in the state of New York? 2. Is he a fugitive from justice? 3. Is he found in this state? 4. Has he been demanded by the executive of the state of New York of the executive authority of the state of Florida? 5. Has the governor of the state of Florida issued his warrant for his arrest?

Counsel for plaintiff in error insists that a copy of the charge against Kurtz in the state of New York—not the original—should have been presented to the governor of this state to authorize the issue of his warrant.

The statute of the United States, section 5278 of the Revised

Statutes, is as follows: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory," etc. It will be seen that the statute is not clear as to whether an original affidavit or copy thereof was intended to be produced to the governor of the state to which the alleged fugitive had fled. But whichever construction may be placed on the statute is unimportant. Either the original affidavit, or a copy of an affidavit in each case, certified by the governor of the state from which the fugitive had fled as authentic, would be sufficient to authorize the action of the governor of the state where the fugitive was found.

Such a certification would place its genuineness beyond dispute.

The fugitive from justice cannot, on *habeas corpus*, impeach the validity of the affidavit upon which the requisition was founded, if it distinctly charge the commission of an offense: *Church on Habeas Corpus*, sec. 476.

The governor of the state issuing the requisition for the fugitive is the only proper judge of the authenticity of the affidavit, and when the requisition certifies that the affidavit "is duly authenticated according to the laws of said state," it is sufficient: *In re Manchester*, 5 Cal. 237; *Church on Habeas Corpus*, sec. 479.

The certification does not make the charge of crime, but simply authenticates the copy of that which does make it, and for this purpose it is conclusive: *In re Manchester*, *supra*.

Counsel for Kurtz insists also that the act of Congress, section 5278, does not authorize the making of the original affidavit before an assistant police magistrate of a city. We are of the opinion that the designation of "magistrate" in the act includes the officer before whom the affidavit was made.

Rapalye and Lawrence's Law Dictionary defines "magistrate" as meaning a judicial officer having a summary jurisdiction in matters of a criminal or *quasi* criminal nature, and is commonly used in the United States to designate two classes of judicial officers, justices of the peace and police justices. An American consul at a foreign port has been held to be a "magistrate" within the meaning of an act which provides that deeds should be acknowledged "before a justice of the

peace, or before a justice of the peace or magistrate in some other of the United States of America, or in any other state or kingdom in which the grantor may reside": *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344.

Counsel also insists that the former discharges of Kurtz by the judge below had the force and effect of *res adjudicata*, and that he could not be arrested a second time for the same charge.

We have examined the numerous authorities submitted by counsel, as well as others referred to in the text-books, and while it seems that in those states, where a judgment of a court in a *habeas corpus* proceeding discharging or remanding to custody a prisoner is final, and a writ of error is allowed thereon, that the principle of *res adjudicata* is applicable, yet in none of these cases was the question of extradition involved. No case brought to our attention has decided that the principle applies where the discharge of the prisoner was from the custody of an officer holding him by virtue of a warrant of a resident governor, upon the requisition of the governor of the state from which he had fled. They are all cases where the parties were restrained of their liberty for alleged crime by some local state law, or seeking discharge from the army or navy, both of which required a hearing and inquiry into evidence, and a judicial determination of the facts and the law.

The courts, in a *habeas corpus* proceeding of this kind, where the prisoner is arrested for extradition, cannot go into a trial of the merits of the cause. The proceeding is only an initiatory step to a trial in another state. As to the guilt of the prisoner, they are not allowed to inquire. Their judicial powers are limited to a determination on the sufficiency of the papers and the identity of the prisoner. If the prisoner is discharged, it will not absolve him from being rearrested on a new warrant issued by the governor. An inspection of the record shows that the act of Congress was complied with, and we are of the opinion that the judgment should be affirmed. It is ordered that Henry D. Holland, the sheriff of Duval County, is hereby authorized and commanded to execute the warrant of arrest issued by the governor of the state of Florida of February 2, 1886, upon the requisition of the governor of the state of New York, for the surrender and delivery of Michael Kurtz, and to deliver the said Michael Kurtz to George T. Lehurst, the agent of the state of New York.

WARRANT ISSUED BY GOVERNOR to arrest fugitive from justice is constitutional: *Commonwealth v. Hall*, 69 Am. Dec. 285. Fugitive from justice from any of United States may be arrested and detained in another state: *In re Fetter*, 57 Id. 382. The civil magistrate should commit a fugitive from justice for a reasonable time, so as to enable the government to surrender the fugitive: *In re Washburn*, 8 Id. 548. It must appear upon the *habeas corpus* that the offense was committed by the accused within the limits of the requesting state; otherwise the prisoner will be discharged: *Ex parte Smith*, 3 McLean, 121. Though the courts have no power to control the executive discretion, that discretion may be examined into where the liberty of the subject is involved: *Matter of Manchester*, 5 Cal. 237. The court, on *habeas corpus*, cannot inquire into the offense charged, when the demand under the act of Congress and the warrant of the requesting state are regular: *State v. Busiac*, 4 Harr. (Del.) 572; *State v. Schlemm*, 4 Id. 577; see also *Nichols v. Canalis*, 7 Ind. 611; *Ex parte Pfitzer*, 28 Id. 440; *In re Clark*, 9 Wend. 212. If the requisition is made with all due formalities, it is the imperative duty of the governor of the state to which the fugitive has fled to comply, without inquiring whether the fugitive has committed a crime according to the laws of the state to which he fled: *Johnston v. Riley*, 13 Ga. 97. Constitutionality declared of statute of Indiana directing that person held under warrant by governor of that state upon requisition of another state, as a fugitive from justice, shall be taken before judge of the circuit or common pleas court for identification: *Robinson v. Flanders*, 29 Ind. 10. Where fugitive has forfeited his bail, and again becomes a fugitive, the governor may order a second arrest and delivery: *Matter of Hughes*, Phill. (N. C.) 57.

PROCEEDINGS FOR ARREST, DETENTION, AND SURRENDER OF FUGITIVES FROM JUSTICE, and the constitutional and statutory provisions in relation thereto, are considered in the note to *Matter of Fetter*, 57 Am. Dec. 389-400. One arrested as a fugitive from justice on a warrant issued by the governor of Alabama, under a requisition of the governor of Pennsylvania, based on an indictment found in the latter state charging him with obtaining goods by false pretenses, may show, on *habeas corpus*, that he was not in Pennsylvania when the crime is alleged to have been committed, nor since, and that he has never fled from Pennsylvania, and therefore is not a fugitive from justice: *In re Mohr*, 49 Am. Rep. 63. Whether one forcibly and illegally brought into one of the United States from a foreign country may be taken from such state on a requisition from another state, and held as a fugitive from justice: *Kerr v. People*, 51 Id. 706. Whether fugitive from justice may be tried for another crime after he has been acquitted of the one, under the charge of which he was arrested and brought into the state: *Hackney v. West*, 57 Id. 101; *State v. Stewart*, 50 Id. 388.

JOHNSTON v. ALLEN.

[22 FLORIDA, 224.]

EQUITABLE PLEA IN COMMON-LAW ACTION, disclosing only facts which would constitute a defense at common law, will be stricken out on motion.

ACCEPTOR MAY PAY NON-NEGOTIABLE DRAFT TO PAYEE without delivery of the draft, if acceptor has not been notified of transfer of the draft, and such payment is a good defense to an action by any such transferee against the acceptor.

BURDEN OF PROOF OF NOTICE of transfer of non-negotiable draft before its payment lies on the plaintiff.

PAYMENT OF NON-NEGOTIABLE DRAFT AFTER NOTICE that the payee had parted with the possession thereof, either by transferring it absolutely or as collateral security, is not a good defense.

ONE WHO HAS DELIVERED DRAFT AS COLLATERAL SECURITY has no right subsequently to forbid or to attach any conditions to its payment.

CONSIDERATION OF TRANSFER OF DRAFT IS NOT PROPER SUBJECT OF INQUIRY in an action by the transferee against the acceptor.

COMPOUNDING FELONY.—In all cases where parties have suffered injury from the commission of a felony, they may compromise or settle their private damages in any way they see fit, provided they do not include in such settlement the stifling of the criminal prosecution for such felony.

COMPOUNDING FELONY.—The assignment of a draft is valid and enforceable against its acceptor, though such assignment may have been made to compound a felony.

ACTION by holder against acceptor of non-negotiable draft
Judgment for plaintiffs.

Alexander C. Abrams, for the appellant.

Hammond and Johnson, for the appellees.

By Court, McWHORTER, C. J. The appellees, R. T. P. Allen and Julia A. Allen, brought suit in the circuit court of Orange County against the appellant on a draft, of which the following is a copy:—

“ORLANDO, Aug. 12, 1881.

“MR. A. D. JOHNSTON, JR.: At sight, pay to John M. Pearce two hundred and seventeen dollars.

“A. D. JOHNSTON, SR.”

“Accepted Sept. 1, 1881.

“A. D. JOHNSTON, JR.”

The defendant filed a plea on equitable grounds, setting forth that the plaintiffs did not become possessed of said draft in the due course of trade, or for a valuable or legal consideration; that one Judson Sharpe, in the year 1881, was in the employ of plaintiffs on board the steamer *Mary Bell*, plying on the *Kissimmee River*, and was charged by plaintiffs with

being a defaulter in a large sum of money, and criminal proceedings were instituted or threatened against the said Sharpe, for the alleged embezzlement. Whereupon the parties agreed to compound and compromise the said felony, and as a part of said compounding the said felony said Pearce deposited with the plaintiffs, among other things, the said draft, as collateral security to secure the plaintiffs whatever sum might be due to them by the said Judson Sharpe; that said Pearce did not receive any consideration for the same; that said Pearce afterwards informed him that the said draft was deposited as collateral, and forbade his paying the same, unless it should be presented properly indorsed by him.

On motion of plaintiffs' counsel, this plea was stricken by the court, and appellant assigns such action of the court as error.

There is no reason why this defense should have been set up in a plea on equitable grounds. There is nothing in it that would give a court of equity jurisdiction—if a bill had been filed for relief.

Whatever defense there was in it was available to the defendant by common-law plea. This court, in the case of *Spratt v. Price*, 18 Fla. 289, decided that when an equitable plea in a common-law action consisted of matter which was a defense at law, that the court of its own motion should strike it out.

The appellant also assigns as error the sustaining of plaintiffs' demurrer to his plea of payment. We think this was erroneous.

As the case must be reversed on this point, it is not improper that we should give our views for the guidance of the court in another trial of it. The draft was not a negotiable instrument. By the authorities the acceptor of such a paper had a legal right to pay the amount called for in it to the payee without demanding a delivery up to him of the draft, provided he had no notice that the payee had transferred the draft to a third person before demanding payment: *Hart v. Freeman*, 42 Ala. 567; Story on Promissory Notes, sec. 106.

Such a payment would be a valid defense against the note, should it afterwards appear, and suit be brought on it against the maker by another holder. The question as to whether Johnston had notice of the transfer by Pearce to plaintiffs of the draft before he claims to have paid it, is a question of fact to be decided by a jury. The burden of proof of this issue

rests on the plaintiffs,—if the defendant proves the payment,—to show that the defendant had notice of the transfer before the payment was made. The pleadings should be formed so as to bring the issue of notice *vel non* before the jury.

If Johnston had notice before or at the time of his alleged payment of the draft to Pearce that Pearce had parted with the possession of it, either by transferring it absolutely, or by giving it to Sharpe to be used by him as collateral, his payment of it with this knowledge would not be a good defense, either as to an absolute transferee from Pearce, or the person who held it as collateral from Sharpe. The defendant says in his equitable plea that Pearce informed him that the draft was deposited as collateral, and forbade his paying it, unless it should be presented properly indorsed by him. If this be true, as to which we say nothing, it was a sufficient notice to him to deprive him of the right to pay the draft to Pearce, and Pearce, having given the draft to Sharpe to be used as collateral, could not afterwards prevent the payment of it to Sharpe's transferee by forbidding the acceptor to pay it until he should indorse it. It would permit him, after agreeing to allow Sharpe to use the draft as collateral, and delivering it to him for that purpose, and after Sharpe had passed it to another person in pursuance of such authority, to attach a condition to it, at the instance of his own will alone, which would nullify the whole transaction, and operate as a fraud on the transferee from Sharpe.

The third assignment of error is, that the court refused to permit evidence to go to the jury as to whether Pearce was indebted to Sharpe, or of the nature of the indebtedness from Sharpe to the plaintiffs, or whether Sharpe was indebted to the plaintiffs at all. We cannot see the materiality of this evidence. It was a matter in which the acceptor was in no wise concerned. His duty and liability were alike limited to the payment of the draft which, by his acceptance, he agreed to pay to the holder; for what indebtedness it was transferred, its amount, or whether there was any indebtedness existing from the payee, Pearce, to his transferee, Sharpe, or from Sharpe to the plaintiffs, has no bearing or influence on his rights or liability.

Appellant also assigns as error the refusal of the court to give the fourth and fifth instructions asked. These instructions are as follows: "4. That the draft sued on is a non-negotiable instrument, and the defendant is entitled to defend

against the plaintiffs (not the payee) in the same manner and on the same ground that he could against the payee, Pearce. That if they believe from the testimony that Johnston has paid the amount of the draft to Pearce in payment of the draft, they must find for the defendant." "5. That even though Allen received the draft for a valuable consideration, the draft being a non-negotiable instrument, he took it subject to all the equities existing between Pearce and Johnston. That if, by reason of payment or offset, Pearce could not recover by suit against Johnston, neither can Allen recover from Johnston. Hence, if the jury believes from the testimony that Johnston has paid the draft to Pearce, Allen cannot recover, and they must find for the defendant."

Both of these instructions were properly refused. They each asked the court to instruct the jury that they must find for the defendant, if Johnston, the acceptor, had paid the draft to Pearce. They put no limit to the time within which Pearce had a right to demand payment from Johnston, and during which it was the duty of Johnston to pay Pearce.

This was as long as Pearce was the owner of the draft. After that time, and when Pearce had transferred the draft to Sharpe, and Sharpe had transferred it to plaintiffs, if Johnston had notice of such transfer, and paid it to Pearce, it was unauthorized, and was not a payment, so far as the plaintiffs are concerned.

The vital question is, Did Johnston, at the time he paid the draft to Pearce, have notice that Pearce had transferred the draft to another person? Yet these instructions ignore this question, and ask the court to charge that, because the paper was non-negotiable, that the acceptor had a right to pay it to the payee, regardless of the question as to whether he knew that the payee had transferred it or not. Supposing that the facts set up in the equitable plea will be again brought before the circuit court in some other form, it is not improper that we should state our views as to their validity as a defense to the action.

The law of contracts relating to the compounding a felony is laid down very clearly. "In all cases of offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage any way he may think fit; but that an agreement for suppressing evidence, or for stifling or compounding a crimi-

nal prosecution for a felony, is void": 2 Chitty on Contracts, 991. The mere fact that Sharpe was under arrest for embezzlement from the plaintiffs would not vitiate or taint any agreement he made with the plaintiffs for the payment of whatever sum he might be indebted to them, unless in consideration of such agreement the plaintiffs were to abandon or suppress the prosecution against him.

But if such an agreement was made by plaintiffs and Sharpe, we cannot see how it is an available defense to the defendant. There is no contest as to the validity and binding force on him of the draft in its inception. He was not privy to the agreement between plaintiffs and Sharpe. His interests are not affected by it in any way: *Mack v. Clark*, 1 Met. 423.

Judgment reversed, and new trial granted.

DEFENSE THAT NOTE WAS GIVEN IN CONSIDERATION OF COMPOUNDING FELONY, what evidence incompetent to sustain: *Bigelow v. Woodward*, 77 An. Dec. 389. Allegation of fraud does not cast upon holder the burden of proving himself *bona fide* holder: *Clapp v. County of Cedar*, 68 Id. 679. Burden of proof in action by indorsee against maker, who pleads that there was no consideration for the note, and that the payee fraudulently transferred it, is upon the plaintiff to show that he received the note before due for a valuable consideration; whereupon the burden shifts back to the defendant to show the plaintiff's knowledge of the want of consideration and fraud: *Davis v. Bartlett*, 80 Id. 375.

The reasoning which permitted the payment of non-negotiable paper without requiring its delivery was, that any action thereon must be brought in the name of the payee or his personal representative, and, consequently, that the defense of payment would be a valid and competent one. Now that non-negotiable paper is assignable, and suit may be brought on it in the name of the assignee, the argument permitting payment of it without obtaining its surrender appears to fall to the ground, and it would seem that, in principle, both classes of paper should be placed in the same category.

The authorities cited by Mr. Story, in his work on promissory notes, section 106, in support of the validity of the payment, are all English cases, decided when choses in action were not assignable in that country, or American cases in which the plaintiff was the original party to the note, or the note had been lost or destroyed. At the reference cited, Mr. Story says: "Another right, in a practical view quite as important to be understood, is, whether the maker of a note has a right to insist, when he is called upon for payment at maturity, that the note itself should be produced and delivered up to him: Chitty on Bills, 8th ed., c. 9, p. 391. When the note is not negotiable, it may not, strictly speaking, be deemed a matter of much consequence; since whoever claims the note must claim it in the name of the payee or his personal representative, and hence it may be supposed that the defense of payment would always be a valid and competent defense. But we are to consider that the proofs of the payment may disappear by lapse of time. . . . It is far, therefore, from being, even here, in many cases, a

matter of indifference; and there would be no hardship in a rule of law which should require, even when the note is not negotiable, that it should either be given up, or a formal receipt given of its being paid, or security given as an indemnity against a second payment to be required from the maker. Such, however, is not understood to be the positive requirement of our law, when the payment of non-negotiable paper is demanded."

In the case of *Hart v. Freeman*, 42 Ala. 567, upon which the decision on this point in the principal case is based, the proposition is laid down without any qualification, and without citation of authority, the court below having held the other way.

BERLACK v. HALLE.

[22 FLORIDA, 236.]

MORTGAGOR'S LEGAL TITLE IS NOT DIVESTED by failure to comply with the conditions of the mortgage, nor by surrender of possession to the mortgagee.

GRANTEE OF MORTGAGOR IS NECESSARY PARTY to foreclosure of a mortgage. A decree to which he is not a party is inoperative as against him, and a purchaser thereunder cannot recover in ejectment against such grantee or his assigns.

ORDINARY MORTGAGE IS NOT EVIDENCE OF RIGHT OF POSSESSION in the mortgagee.

EJECTMENT by Halle and wife against Berlack. Both parties claimed under Loudrick Warrock and wife, who, on March 27, 1873, mortgaged the premises in controversy to C. B. Benedict, and on March 20, 1876, conveyed them to A. J. Myers, by a conveyance duly recorded on the 29th of the same month. The latter conveyed to M. C. Jordan, in August, 1884, under whom the defendants had possession as his tenants. The mortgage having been assigned to H. S. Sayre, he in September, 1879, brought suit to foreclose it, making only the original mortgagors parties defendant. A decree of foreclosure was entered, and a sale and conveyance thereunder made to Sayre, who subsequently conveyed to Mrs. Halle. There was testimony on the part of plaintiffs to the effect that the mortgagors, still being in possession when the foreclosure proceedings were instituted, surrendered such possession to S. G. Spearing, as agent of Sayre. The testimony of Jordan was to the effect that the property was vacant and unoccupied at the date of its conveyance to him, and that he thereupon took possession, made some improvements, and leased to defendants and others. The court instructed the jury to the effect that the conveyance of the mortgagors to Myers constituted no impediment

to plaintiffs' recovery. Verdict for plaintiffs. Defendants moved for a new trial, which was denied.

M. C. Jordan, and A. W. Cockrell and Son, for the appellant.

Randall, Walker, and Foster, for the appellees.

By Court, RANEY, J. The first question to be disposed of is as to the introduction of the decree of foreclosure in support of the master's deed, in the absence of such prior proceedings as showed jurisdiction. In so far as jurisdiction of the parties to the suit in which this decree was rendered is concerned, the objection was cured by the defendant, Berlack, having introduced the bill and other proceedings in the cause. The effect of this decree and the other proceedings in the suit, including the sale, upon the land, and the defendant's rights therein, are to be considered.

The subpoena in the foreclosure suit was issued on the twenty-fifth day of September, 1879, and was served on the next day. At this time, the legal title was, and had been, in Myers for more than three years, by deed from Warrock and wife, made March 20, 1876, and recorded in the clerk's office of Duval County nine days after its execution. It is true that there had been a failure to comply with the conditions of the mortgage prior to the conveyance to Myers; but this did not vest the legal title in Benedict, the mortgagee, nor in his assignee, Sayre; it remained in Warrock until he conveyed it to Myers. The legal title is divested only by forfeiture of the conditions, and a sale under the decree of the court. The mortgagor remains until a sale, seised in fee: *McMahon v. Russell*, 17 Fla. 698; *Pasco v. Gamble*, 15 Id. 562. Cases which maintain, as *Frische v. Kramer's Lessee*, 16 Ohio, 138, 47 Am. Dec. 368, and others, that as between mortgagor and mortgagee, and persons holding under either or both after condition broken, the legal estate becomes absolute in the mortgagee, subject, however, to be redeemed by payment of the debt, are not consistent with the former decisions of this court, or with our own views of the statute.

The owner of the legal title is a necessary party to a suit for foreclosure of a mortgage: Jones on Mortgages, sec. 1394; Barbour on Parties, 502; *Hall v. Nelson*, 23 Barb. 88; *Reed v. Marble*, 10 Paige, 409. Myers was not a party to the foreclosure suit, so the title remained in him, unaffected by it (*Reed v. Marble, supra*; *Watson v. Spence*, 20 Wend. 260), and is now in

Jordan. The decree did not change Sayre's *status* to the land. Warrock and wife having conveyed, they had no longer any right to redeem the land from mortgage, as holders of the legal title, whatever Warrock's duty to pay the debt secured by the mortgage was. The legal title has never been in Benedict or Sayre. The mortgage did not put it in the former; nor did the alleged foreclosure suit, decree, and sale put it in Sayre, because the legal title was not before the court; and consequently it was not conveyed by the deed to Mrs. Halle. She has no better *status* than that of an assignee or holder of the mortgage, with, to say the most, an accounting decree against Warrock, whatever such decree may be worth as such an accounting as against the holder of the legal title.

There is nothing to show that Warrock, who continued in possession after this conveyance to Myers, held adversely to Myers. When he gave possession to Sayre, he did not have the legal title,—it was in Myers; he must be presumed to have held under Myers's title, and not adversely: *Bedell v. Shaw*, 59 N. Y. 46. Had he then held the legal title, we do not think that a mere surrender of possession to Sayre would have passed such title to the latter: *Trimm v. Marsh*, 54 Id. 599; 13 Am. Rep. 623.

It is not necessary for us to question the doctrine of those cases which hold that a mortgagor or his assigns cannot recover in ejectment against a mortgagee lawfully in possession. There is nothing to show that Sayre was ever lawfully in possession as against Myers, or that Warrock, who prior to putting Sayre in possession had conveyed all his interest in the land to Myers, was authorized by the latter to deliver possession for him to Sayre. Had Warrock delivered possession before making the deed to Myers, the case of *Gillet v. Eaton*, 6 Wis. 33, would be more in point; yet there would still be the difference that in it, as in *Tallman v. Ely*, 6 Id. 244, the mortgagee was in possession defending, while here he is suing an ejectment for possession. Sayre's possession, as against Myers, is no better than Warrock's, and there is no basis in the record for the position that Myers could not recover against Warrock, were he in possession. The lawful possession, as against the mortgagee, is with the holder of the legal title, under our statute, at least until it be shown that he has parted with it of his own volition, or it has been taken from him by judicial proceedings to which he is a party. In *Tallman v. Ely*, *supra*, the mortgagee was regarded as lawfully in pos-
ses-

sion, and the doctrine of *Frische v. Kramer's Lessee*, 16 Ohio, 138, 47 Am. Dec. 368, is approved. In *Howell v. Leavitt*, 95 N. Y. 617, it is said that "in most of the cases which have upheld the right of the mortgagee to possession, his possession was obtained with the consent, express or implied, of the owner of the land, although in some of them the mode of acquiring possession did not distinctly appear, and in many the rule is stated quite broadly, and with little of restriction or limitation." Assuming that the right of retention of possession against an assignee of the mortgagor will be recognized under our statute, we think such right of possession must emanate from the mortgagor while he is the owner of the legal title, or in other words, prior to his conveyance of it to his grantee. The burden is upon the mortgagee to show that he has the right to possession: *Goss v. Welwood*, 90 N. Y. 638; *Bedell v. Shaw*, 59 Id. 46. And under our statute, an ordinary mortgage is not itself evidence of any such right: *Pasco v. Gamble*, *McMahon v. Russell*, *supra*.

As the legal title was not affected by the foreclosure proceedings, or the deed under them, we do not think such proceedings or deed were of any effect to show a legal title in Sayre, as against Myers or Jordan, or any one claiming under them: *Reed v. Marble*, 10 Paige, 409.

Upon the rule that in ejectment the plaintiff must recover upon the strength of his title, Mrs. Halle has no standing, for she has not connected herself with the legal title, except to show a specific lien upon it which is not the basis of a recovery in this action: *Pasco v. Gamble*, *supra*; nor has she shown a lawful possession emanating from the holder of such title.

The testimony shows no act of possession by Sayre subsequent to April, 1883, when Spearing says he turned over the possession to Sayre. Jordan, without warrant from another, took possession, and he built up the fences about June 14, 1884. How long before this he had been in possession, he does not say. He says the property was vacant and unoccupied when he took possession. He allowed Hernandez to occupy it, and the defendant was his tenant at the execution and delivery of the deed by Myers, and of the institution of the action of ejectment; that he, Jordan, was in actual possession, and the deed from Myers covers the property.

The testimony shows that the defendant was in possession under Jordan, and Jordan, at the commencement of the action, held the legal title, and such being the case, under the facts

as reviewed above, we think his possession is protected by title from Warrock, through Myers, against the plaintiffs, who have no legal title, and no authorized possession as against Jordan as the holder of the legal title from Myers.

The circuit judge erred in the charge he gave to the jury, and in refusing to give the instructions offered by the defendant. The former is in conflict with the views we have expressed, and the latter are consistent with such views, as will be seen by considering them.

The judgment is reversed, and a new trial granted.

WHERE NO POWER OF SALE IS EMBRACED IN MORTGAGE, the mortgagor or his grantee cannot, under any circumstances, in California, be cut off from his estate, except by sale in pursuance of a judicial decree: *Goodenow v. Ewer*, 76 Am. Dec. 540.

ALL PERSONS ARE PROPER PARTIES TO SUIT TO FORECLOSE MORTGAGE who are beneficially interested, either in the estate mortgaged or the demand secured. This rule, generally, will embrace only the mortgagor and the mortgagee, and those who have acquired rights or interests under them: *San Francisco v. Lawton*, 79 Am. Dec. 187.

FORECLOSURE AND SALE OF MORTGAGED PREMISES DO NOT AFFECT RIGHT OF REDEMPTION of the grantee of the mortgagor, who was not made a party to the proceedings: *Childs v. Childs*, 75 Am. Dec. 512.

WHERE GRANTEE OF PURCHASER OF LAND AT FORECLOSURE SALE BRINGS SUIT against a grantee of the mortgagor, who had not been made a party to the suit for foreclosure, to quiet title to the land, relying upon twelve years' adverse possession, taken and held under the sheriff's deed, the suit cannot be regarded as a suit for the foreclosure of the mortgage: *Arrington v. Liscom*, 94 Am. Dec. 722; *Anson v. Anson*, 89 Id. 514.

SUBSEQUENT PURCHASERS AND ENCUMBRANCERS, whether necessary or proper parties in foreclosure suits: *Street v. Beal*, 85 Am. Dec. 504. In many of the states the effect of a mortgage as a conveyance of the legal title has been destroyed by enactments, which convert it into a mere lien upon the property. The obvious consequence of the retention of the legal title by the mortgagor is his ability to convey such title at his pleasure. It is true that the title is still subject to the mortgage lien. But when the lien is to be made effective by proceedings to appropriate the title to its satisfaction, there can be no question that such title can be reached only by some proceeding directed against the party by whom it is held. It is incomprehensible that any person should have conceived the idea that the title could be divested under foreclosure proceedings against the mortgagor, commenced at a time when he retained no interest in the property, and the proper evidence of his transfer was upon the records of the county in which the land was situate. Yet, at least in some of the states, the early foreclosure proceedings very generally ignored transfers made subsequent to the mortgage and prior to the institution of such proceedings. It is clear that an execution or judicial sale can have no greater operation than could a conveyance of the property, executed by all the parties, at the commencement of the action or proceeding. What they cannot do voluntarily, they cannot be made to do by compulsion. The conveyance, though executed by an officer

of the law or of the court, is, nevertheless, in legal contemplation, their conveyance, and theirs alone. Hence it cannot divest the estate of their grantees by grants duly executed and recorded prior to the pendency of the suit: *Goodenow v. Ewer*, 76 Am. Dec. 540; *Boggs v. Hargrave*, 76 Id. 561; *San Francisco v. Lawton*, 79 Id. 187.

If, however, under the law of the state, the mortgagee is at the time of the foreclosure sale vested with the legal title, it will pass to the purchaser, leaving grantees of the mortgagor, who are not parties to the suit, vested, as before the foreclosure and sale, with an equity of redemption, to the assertion of which the foreclosure constitutes no impediment: *Frische v. Kramer's Lessee*, 47 Am. Dec. 368; *Childs v. Childs*, 10 Ohio St. 339; 75 Am. Dec. 512; *Stewart v. Johnson*, 30 Ohio St. 30. As against a junior grantee or encumbrancer under the mortgagor, not made a party to the suit, the utmost effect which can be accorded to a foreclosure and sale is to treat it as an assignment to the purchaser of the mortgage debt, and of the right of the mortgagor to satisfy it out of the mortgaged premises, in case the latter has not by the law of the state the legal title. If, however, he holds the legal title, that also vests in the purchaser, from whom it may be redeemed by any person not a party to the suit, claiming under the mortgagor, whether as purchaser or as encumbrancer: *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514; *American Button Hole Co. v. Burlington M. L. Ass'n*, 61 Iowa, 465; *Spurgin v. Adamson*, 62 Id. 668.

"Under the old theory of mortgages, when they were treated as conveyances, the property passed to the mortgagee upon condition that it should revert to the mortgagor if the obligation, for the security of which it was executed, was performed; otherwise that the mortgagee's interest should become absolute. The mortgage was in terms the conveyance of a conditional estate, which became absolute upon breach of the condition. But courts of equity at an early day, looking beyond the terms of the instrument to the real character of the transaction, as one of security and not of purchase, interfered and gave to the mortgagor a right to redeem the property from the forfeiture following the breach, upon discharge of the debt secured, or other obligation, within a reasonable period. With this equitable right of redemption in the mortgagor, a corresponding right in the mortgagee to insist upon the discharge of the debt, or other obligation secured, within a reasonable time, or a relinquishment of the right to redeem, was recognized by those courts; the mortgagee could therefore bring his suit to foreclose the equity of redemption, unless the debt or other obligation was discharged within a reasonable time. To such a proceeding the holder of the equity of redemption was an essential party, for it was his right that he was to be affected. His equity of redemption was regarded as the real and beneficial estate in the land; it was subject to transfer by him, and to seizure and sale on judicial process against him. If it were transferred to another, such other party stood in his shoes and was equally entitled to be heard before his right could be cut off. It was certainly possible for him to show that the mortgage was satisfied, or his liability released, or that in some other way the suit could not be maintained. The holder of the equity of redemption was therefore an indispensable party to a valid foreclosure. The old common-law doctrine of mortgages does not now generally prevail in the several states of the Union. In most of them the mortgage is not regarded as a conveyance, but is treated as a mere lien or encumbrance upon the property as security for the payment of a debt, or the performance of some other pecuniary obligation. But the owner of the property, whether the original mortgagor

or his successor in interest, has the same right to be heard respecting the existence of the debt or obligation alleged before the property can be sold which at common law the owner of the equity of redemption had to be heard before the foreclosure of his equity could be decreed": *Terrell v. Allison*, 21 Wall. 292.

ADAMS v. RE QUA.

[22 FLORIDA, 250.]

JUDGMENT MAY BE AMENDED NUNC PRO TUNC AFTER LAPSE OF TERM, when the record discloses that the judgment, as amended, would have been entered in the first place but for the inadvertence of the court, or the error or omission of the clerk.

RECORD CAN BE AMENDED ONLY BY MATTERS OF RECORD.

TO DETERMINE WHETHER ONE IS PARTY IN REPRESENTATIVE CAPACITY, the averments and scope of the complaint must be considered.

JUDGMENT AGAINST DEFENDANT PERSONALLY MAY BE AMENDED so as to be against him as administrator *de bonis non, cum testamento annexo*, etc., where the record shows that the action was against him in his capacity of such administrator.

PROCEEDING to amend a judgment. An action was commenced which was entitled *Helen Re Qua* for the use of Edwin Higgins against John S. Driggs, administrator of estate of John S. Adams, deceased. The complaint showed that the claim was against Driggs in his representative capacity. Judgment was entered November 12, 1879, against Driggs personally, upon which an execution issued July 19, 1880, commanding the sheriff "that of the goods and chattels, lands and tenements of John S. Driggs, as administrator of the estate of John S. Adams, deceased," be made the moneys designated in such judgment. Four days later, plaintiff moved to amend the judgment *nunc pro tunc*. Charles S. Adams having in the mean time been appointed administrator *de bonis non, cum testamento annexo*, of the estate of said John S. Adams, *scire facias* issued to him as such administrator. He demurred to the *scire facias*, and also moved to quash it. The demurrer was overruled, the motion denied, and the judgment ordered to be amended so as to be against John S. Driggs as administrator *de bonis non, cum testamento annexo*, of the estate of John S. Adams, deceased, and to authorize a levy on the goods, chattels, lands, and tenements of said estate in the hands of said administrator to be administered. Said C. S. Adams, as administrator *de bonis non*, etc., sued out a writ of error.

A. W. Cockrell and Son, for the plaintiff in error.

H. Bisbee, for the defendant in error.

By Court, McWHORTER, C. J. The plaintiff made her motion in the circuit court of Duval County to amend a judgment rendered in the circuit court of said county on the twelfth day of November, A. D. 1879, wherein she was plaintiff for the use of Edward Higgins, and "John S. Driggs, administrator of J. S. Adams, deceased," was defendant.

The object of the motion was that the judgment and execution should be so amended as that it should appear thereon that they were awarded against John S. Driggs, as administrator *de bonis non, cum testamento annexo*, of J. S. Adams, deceased. The rule is settled that a judgment rendered at one term may be amended at a subsequent term, *nunc pro tunc*, when from the record in the cause it is apparent, on inspection thereof, that the proposed amendment would have been a part of the original judgment, or that the original judgment would have been in accordance therewith if it had not have been for the inadvertence of the court, or an error or omission of the clerk.

The rule that the record admits of no alteration after the term is obsolete: Freeman on Judgments, sec. 71. What is proper *data* to authorize an amendment is a matter on which the decisions of the courts of the different states are contradictory. The better opinion seems to be that no record can be amended but by matter of record: *Pitman v. Lowe*, 24 Ga. 429; *Funnell v. Jones's Ex'r*, 7 Bush, 359; *Stephens v. Wilson*, 14 B. Mon. 88; *Makepeace v. Lukens*, 27 Ind. 435; *Moody v. Grant*, 41 Miss. 565.

The record, the judgment and the execution contained in which is sought to be amended, shows that a suit was brought against John S. Driggs, administrator of J. S. Adams, deceased, on two promissory notes alleged to have been made by said Adams in his lifetime, and contains no statement of any cause of action against Driggs individually. It was unquestionably a claim or demand against Driggs in his representative capacity, and must have been so understood by all the parties to the suit. In a similar case in New York, and which has mainly contributed to our conclusion (*Beers v. Shannon*, 73 N. Y. 292), the suit was entitled "John L. Beers, executor of the last will and testament of John Beers, deceased."

The court say: "The first point made by the defendant is

this, that the action is not brought by the plaintiff in a character representative of the deceased obligee. This is based mainly upon the omission of the word 'as' between the name of the plaintiff John L. Beers, and the description of him, 'executor of, etc., of John Beers, deceased,' in the title of the summons, and in the body of the summons, and in the title to the complaint. It is true that without that word, in that position, it has been sometimes held that the addition to the name of the party is but a *descriptio personæ*, and does not give to him other than a personal or individual character in the action. But it has been held, on the other hand, that though there be naught in the title of the process or the complaint to give a representative character to the plaintiff, that the frame and averments and scope of the complaint may be such as to affix to him such character and standing in the litigation: *Stillwell v. Carpenter*, 62 N. Y. 639; 2 Abb. N. C. 238. In the case in hand, the averments of the complaint are such that the defendant had full notice of the questions to be tried; that there was a definite issue presented for trial; that the judgment to be recovered might show what was determined by it, and that any other question dependent upon the character in which the plaintiff sued could be readily presented. It was plain from the complaint that the cause of action, if any, devolved upon the plaintiff, as a representative of the deceased obligee, by the creation of a representative relation by the will."

"The remedy was patent and easy by motion to amend": *Id.*; see also *Stillwell v. Carpenter*, 62 N. Y. 639; *Shand v. Hanly*, 71 Id. 319; *Snead v. Coleman*, 7 Gratt. 300; 56 Am. Dec. 212.

The judgment should have been properly against Driggs in his representative capacity: *Branch v. Branch*, 6 Fla. 314; but under our liberal system of amendments, which makes it the "duty of the courts of this state, and of every judge thereof, at all times to amend all defects and errors in any proceeding in civil cases" (McClellan's Digest, sec. 97, p. 834), if it had been called to the attention of the court at the trial, the record would have been amended by inserting the word "as" before the designation of his representative capacity, it being apparent from the body of the declaration that such was plainly the intention. It still being apparent from the record, there can be no objection to making the amendment at a subsequent term *nunc pro tunc*. The record also shows

that it was Driggs, as administrator *de bonis non, cum testamento annexo*, who was intended, and this amendment was properly allowed. As to any rights acquired or lost under this judgment prior to the amendment in the court below we express no opinion.

There is no error in the record, and the judgment is affirmed.

JUDGMENT MAY BE ENTERED NUNC PRO TUNC WITHOUT NOTICE, IN ALABAMA, and perhaps in all those states in which the action of the court must be determined solely from an inspection of its records: *Fugua v. Carriel*, Minor, 170; 12 Am. Dec. 46; *Glass v. Glass*, 24 Ala. 468; *Young v. State Bank*, 4 Ind. 301; 58 Am. Dec. 630. A record may be amended in the lower court pending proceedings by writ of error or on appeal; and as amended, may be certified to the appellate court: *Reo v. Barker*, 2 Cow. 408; 14 Am. Dec. 515, and note. While the right to enter or amend a judgment *nunc pro tunc* after the lapse of a term is, so far as we are aware, universally conceded, there is a question with respect to the evidence upon which the action of the court may be based. Many of the courts will refuse to proceed except where their action can be based solely upon matters in the record, wherefrom the propriety and extent of their action become apparent. Others will act upon any competent legal evidence: *Freeman on Judgments*, sec. 63; *Raymond v. Smith*, 1 Met. 65; 71 Am. Dec. 458; *Summersett v. Summersett's Adm'r*, 40 Ala. 596; 91 Am. Dec. 494; *Smith v. Hood*, 25 Pa. St. 218; 64 Am. Dec. 692.

PENINSULAR RAILROAD COMPANY v. GARY.

[22 FLORIDA, 356.]

ROAD-MASTER AND CONDUCTOR OF RAILROAD COMPANY HAVE NO AUTHORITY TO EMPLOY SURGEON to treat an injured employee of such company.

John G. Reardon, for the appellant.

S. D. McConnell, for the appellee.

By Court, VAN VALKENBURGH, J. In February, A. D. 1882, Thomas P. Gary, by his attorney, sued the Peninsular Railroad Company to recover the sum of \$165, on account, for services rendered and medicines furnished to White Spate, as a physician and surgeon, at the instance and request of the defendant, in the county of Marion. A demurrer was filed by the defendant to the declaration, which was overruled by the court, and a plea was interposed of the general issue. In June, 1885, on the application and consent of the attorneys of both the parties, the cause was referred, under the statute, to Richard McConathy, a practicing attorney of the court, to hear said cause, and for final determination thereof, and with

power to render judgment therein according to the statutes. On the 27th of July, 1885, the referee filed his report and findings. He found for the plaintiff, Thomas P. Gary, in the sum of \$165, with interest thereon at the rate of eight per cent per annum from the thirteenth day of January, 1882, until paid, with costs. The defendant's attorney then moved the said referee for a new trial on the following grounds: 1. Because the finding and judgment is contrary to law; 2. Because the statement of the evidence used on said reference does not support said findings and judgment, and because they are contrary to the evidence; 3. Because the judgment is for a larger sum than is sued for, and for a larger amount than is proven.

On the 29th of July, 1885, this motion was heard by the referee, who made the following order: "It is ordered that the plaintiff be required to remit thirty dollars of the judgment herein on or before the 30th of July, 1885, else a new trial will be granted." On the 30th of July, the plaintiff remitted thirty dollars of the principal, and interest on said thirty dollars, of the judgment, and the referee overruled the motion for a new trial. The defendant excepted to this ruling of the court, and brings his appeal, assigning the following errors: 1. That referee erred in deciding that there was sufficient evidence on the part of the appellee to prove that the appellant had employed him, and undertaken to pay him for the surgical attention to White Spate; 2. The referee erred in finding that any authorized agent of the appellant had employed in its behalf the appellee, or contracted with him to perform the surgical services in question; 3. The referee erred in deciding that the appellant was bound to pay the appellee for the services in question upon the employment of appellee by either Redd, the road-master, or Jolly, the conductor, of the appellant; 4. The referee erred in finding that White Spate was wounded while in discharge of a duty to appellant; 5. The referee erred in finding that the "statement of the evidence" operated as an admission of facts therein set forth, and in not finding that said statement only stated the testimony as given by the different witnesses; 6. The referee erred in finding that Redd, the road-master, had authorized the employment of appellee; 7. The referee erred in finding that Jolly, the conductor, had employed appellee.

The referee's finding and report, as it appears in the record, is as follows:—

"Thomas P. Gary, plaintiff, v. Peninsular Railroad Company, defendant.

"This action this day coming on for trial, came the parties by their respective attorneys, and thereupon the parties filed a statement of the evidence to be considered herein, which statement is now filed marked 'A' No. 1, which statement contains all the evidence heard on the trial. And this action being heard on the evidence, and the argument of counsel, and the referee being advised, delivered a written opinion herein which is now filed. Thereupon the referee finds that the law and the proof herein is for the plaintiff. It is therefore adjudged that the plaintiff, Thomas P. Gary, recover of defendant, Peninsular Railroad Company, the sum of one hundred and sixty-five dollars, with interest thereon at the rate of eight per centum per annum from the thirteenth day of January, 1882, until paid, and his costs therein expended, to be taxed by the court.

"RICHARD McCONATHY, Referee.

"July 22, 1885."

The statement of evidence, referred to in the finding marked "A" No. 1, is as follows:—

"Thomas P. Gary v. The Peninsular Railroad Company.

"It is agreed by counsel for the plaintiff and defendant that the following is a true statement of the evidence in the above stated cause, and we do hereby consent to waive the examination of the witnesses, and use this statement in evidence on the trial of said cause as all the evidence therein.

"On August 31, 1881, one White Spate, who was an employee of the defendant, and working on defendant's railroad, was injured by being run over by one of defendant's trains while he was in discharge of his duty. Redd, who was a road-master upon defendant's railroad, who had charge of the squad in which Spate was working, obtained transportation for Spate on a train of which James Jolly was then conductor, and instructed Jolly to carry him to the plaintiff, at Ocala, for surgical treatment, the plaintiff being a practicing physician and surgeon, residing at Ocala, with his diploma on file in the clerk's office of the clerk of the circuit court. Jolly carried the wounded man to Ocala and sent for plaintiff, and told the plaintiff what Redd had ordered him to do with the man, and he requested plaintiff to give him the necessary surgical attention. Plaintiff asked Jolly who would pay his fees. Jolly stated that the defendant would pay, and that

he was authorized to employ plaintiff. The plaintiff then examined Spate and found his leg badly mashed, and that the injury was such as to render amputation necessary in order to save the life of the patient. Plaintiff then amputated the leg of the patient and treated him for fourteen days, until he recovered, and paid out for medicines and bandages used for the benefit of the patient, and necessary to the successful management of the case, the sum of twenty-five dollars. The bill rendered by the plaintiff against the defendant for surgical and medical treatment rendered, and money paid out for the patient in the treatment of the case, was \$145, which is proven to be a reasonable charge for the services rendered. There is a controversy as to the employment of the plaintiff by Redd, the road-master. There is no controversy about James Jolly, the conductor upon defendant's road, having employed the plaintiff, or as to the performance of the service by the plaintiff, or as to the reasonableness of the bill rendered and here sued on. The defendant denies the authority of the road-master and conductor to employ the plaintiff so as to bind the defendant and render it liable for the debt sued on.

"March 26, 1884.

(Signed)

"S. D. McCONNELL,

"MILLER AND SPENCER,

"Plaintiff's Attorneys.

"SCOTT AND REARDON,

"Defendant's Attorneys."

There is but one question in this case to be considered, and that is, Is the defendant bound by the acts of the road-master, Redd, or the conductor, Jolly, in the employment of the plaintiff as surgeon for Spate? There is no proof that the company by its general manager, or otherwise, ever directly or indirectly ratified in any manner the action of Redd or Jolly, or that they, or either of them, had any authority to employ a physician or surgeon in such cases, and make such action binding upon the company. Their duties as road-master and conductor did not necessarily involve any such authority. In 1 Rorer on Railroads, 666, it is said that "a yard-master of a railroad company is not so far the agent of the company as to be legally authorized to employ a physician to attend to one of the employees under his charge who is injured by the cars of the company. But it is held that the general superintendent possesses such power, and power also to employ an attorney. Nor has a station-agent of a railroad company, merely as such,

authority to commit the company to liability by orders or contracts given or made outside the business of his office, or matters coming within the line of his duties. And his sending for a surgeon to treat an employee of the company who is injured in the course of his employment will not in itself render the company liable to pay the medical bill for such treatment. Nor will the conductor's direction to the surgeon to extend the medical aid, or his promise that the same when rendered shall be paid for, render the company liable to pay for the same. Such acts not being within the business employment of these servants or agents, the company are not bound thereby."

The acts of these agents of the company in the employment of the surgeon should have been ratified by the company through its general manager or superintendent, or the authority to make such employment should have in some way been proved. The plaintiff was fourteen days in attendance on the patient, sufficiently long to have frequently corresponded with the manager of the road, and to have received from him ratification or otherwise of the employment. The road probably had a telegraph line from its headquarters through Ocala by which the news could have been very quickly conveyed and an answer returned. It does not appear by the record that the company, or any of its officers, except only Redd and Jolly, were ever aware of the injury done to Spate, or were informed of the employment of the plaintiff until this action was brought.

In the case of *Tucker v. St. Louis etc. R'y Co.*, 54 Mo. 177, the court says: It will appear by an examination of the evidence that the facts which it tended to prove, if all taken to be true, do not prove the liability of the defendant to pay for the services of the plaintiff sued for. "It is shown that the station-agent of defendant, when the young man was injured, directed a boy to go for a doctor, and that the boy brought the plaintiff, and that the conductor on the cars of defendant told plaintiff to give the wounded man attention and he would be paid; but there is no pretense of any evidence by these witnesses that they have any authority to employ a physician on defendant's account, or that they ever pretended to employ a physician on defendant's account. It is only shown that they were agents of defendant in conducting its railroad business, which of itself could certainly give them no authority to employ physicians for the defendant to attend and treat persons accidentally injured on the road."

The rule as laid down in *Rorer on Railroads*, *supra*, is sustained by abundant authority. See *Atlantic and Pacific R. R. Co. v. Reisner*, 18 Kan. 458, where it is held that a mere station-agent has no such authority to bind the company, but that the general agent or manager, by virtue of his position, has such authority: *Marquette and Ontonagon R. R. Co. v. Taft*, 28 Mich. 289; *Atchison and Nebraska R. R. Co. v. Reeher*, 24 Kan. 228; *Brown v. Missouri etc. R. R. Co.*, 67 Mo. 122; *Louisville, Evansville, & St. L. R. R. Co. v. McVay*, 98 Ind. 391; 49 Am. Rep. 770.

Many other cases to the same effect might be cited, and we know of no authority to the contrary, except the case of *Terre Haute & I. R. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, which we do not approve. The company cannot be held liable upon the contract of the road-master or conductor in employing the physician, inasmuch as there is, in this case, no proof of their authority to bind the corporation. Had the acts been ratified by the corporation, or by their general manager, the case would have been different.

The judgment is reversed, and a new trial awarded.

LIABILITY OF RAILROAD COMPANY FOR SURGEON'S ATTENDANCE ON INJURED EMPLOYEES. — A railroad company, like any other employer of labor, is not bound to pay for medical or surgical services rendered to its employees who may have been accidentally injured in the course of their employment; and the exception is, that where there is an immediate and urgent necessity for such services, they may be procured at the instance of the superior agent of the company, present at the time being; and that the plaintiff should notify the company, or its manager, or some official having general authority, with all reasonable dispatch, and obtain a ratification, or the reverse, of the authority given by the local agent. In the principal case the plaintiff had ample opportunity of communicating with the managing officials of the company, but neglected to do so; and it does not appear that the company, or its officers, were ever aware of the accident until the action was brought. The case of *Terre Haute & I. R. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, illustrates the exception to the rule. There, the circumstances of the case were of such urgent necessity that, in the interests of humanity, the surgeon had to be employed immediately. The accident occurred at a point distant many miles from the principal offices of the company, and the conductor was the highest agent of the company on the ground. The court held that, under the special circumstances of the case, the conductor had power to employ a surgeon to attend to the injured man, and that the company was bound to pay for the services rendered. The liability of the company arises only under the special contract made on its behalf by such of its officials having general authority for that purpose (except in the case of emergency), and not by reason of its relation of employer towards the injured person. In *Marquette and Ontonagon R. R. Co. v. Taft*, 28 Mich. 289, it was held that while, as a general rule, a railroad company is not liable for injuries received

by their employees in their service, yet this rule is subject to the exception of cases where the injury comes from the negligent employment by the company of reckless or incompetent servants, or worthless machinery.

MASTER IS LIABLE TO SERVANT FOR INJURIES CAUSED BY NEGLIGENCE OF INCOMPETENT FELLOW-SERVANT: *Cayzer v. Taylor*, 69 Am. Dec. 317.

MASTER IS LIABLE TO SERVANT FOR INJURY CAUSED BY MASTER'S NEGLIGENCE, when the defect causing such injury was known to the master and not known to the servant: *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 212; *Nashville and Chattanooga R. R. Co. v. Elliott*, 78 Id. 506.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT: *Carroll v. Minnesota*, 97 Am. Dec. 221; *Gilman v. Eastern R. R. Co.*, 90 Id. 210; *O'Connell v. Baltimore and Ohio R. R. Co.*, 83 Id. 549.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGERS is based on an altogether different principle. There the company is bound to exercise the highest degree of care and diligence, and is responsible for all injuries to passengers resulting from the slightest negligence, or want of skill or prudence: *Nashville and Chattanooga R. R. Co. v. Elliott*, 78 Am. Dec. 506. Although railroad companies are not held liable as insurers of the safety of passengers as they are as common carriers of goods, and of the baggage of passengers, yet the rule in regard to the degree of care and vigilance exacted from them is an extremely rigorous one. They are held bound to the highest degree of care and diligence, and are answerable for all injuries to passengers resulting from the slightest negligence or want of skill or prudence: *Redfield on Railways*, c. 17, sec. 1, and notes; *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. 468; *Johnson v. Winona and St. Peter R. R. Co.*, 88 Id. 83; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700. In case of passengers, railroad companies are bound to avail themselves of all new inventions and improvements known to them which will contribute to the safety of their passengers, and the adoption of which is within their power, so as to be reasonably practicable: *Sellers v. Delaware and Hudson Canal Co.*, 3 Hun, 340; see note to *Smith v. New York etc. R. R. Co.*, 75 Am. Dec. 310.

CARRIERS OF PASSENGERS ARE RESPONSIBLE FOR SLIGHT NEGLECT, and bound to use extraordinary care: *Morrissey v. Wiggins Ferry Co.*, 97 Am. Dec. 402; *State v. Baltimore and Ohio R. R. Co.*, 87 Id. 600. Railroad companies are held to a strict rule of accountability for the safety of passengers. To enable them to properly discharge this duty, they have the power to make reasonable rules and regulations: *McDonald v. Chicago and Northwestern R. R. Co.*, 96 Id. 121.

CONTRIBUTORY NEGLIGENCE.—Passenger must show that he was not guilty of any want of ordinary care which directly contributed to the injury. Exceptions to this rule are, where the injury was intentionally done, or where it could have been avoided by the company by the exercise of ordinary care: *Louisville and Nashville R. R. Co. v. Sickings*, 96 Am. Dec. 320. Sick persons have the right to enter cars of railroad company, but the cars are not traveling hospitals, nor are railroad employees nurses. It is the duty of disabled persons to provide proper assistance for themselves while traveling in railroad cars. Assistance extended by conductor is an act of courtesy merely. If passenger requires more than ordinary time to leave the car, he should give notice to the conductor: *New Orleans, Jackson, and Great Northern R. R. Co. v. Statham*, 97 Id. 478, and note.

RAILROAD COMPANY SELLING THROUGH-TICKET is liable to passenger for injury occurring on any of the connecting lines, but the connecting road is not

liable, if at all, unless the injury occurred on its road, or through its negligence: *Candee v. Pennsylvania R. R. Co.*, 94 Am. Dec. 566. A railroad company is not held to take every possible precaution against danger, but is bound to use the utmost care which is consistent with the nature of its business, and is responsible for the consequences of its own negligence, although the negligence or misconduct of a third party may have contributed to the injury: *Simmons v. New Bedford, Vineyard, and Nantucket Steamboat Company*, 93 Id. 99. Ordinary capacity, and ordinary care in protecting himself, is all that is required of a passenger in a railway car; and a sick or aged person or child is entitled to more care from a railroad company than a person in good health, or under no disability: *Sheridan v. Brooklyn and Newton R. R. Co.*, 93 Id. 490, and note. A railroad company is not liable for injuries caused to a passenger during a fight among a mob of drunken men, who rushed with such violence and in such numbers upon the cars as to overwhelm the conductor as well as the passengers: *Pittsburgh etc. R'y Co. v. Hinds*, 91 Id. 224.

MEASURE OF DAMAGES. — The expenses of medical treatment and care are included among the ordinary grounds of damages necessarily resulting from bodily injuries: *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; *Ohio & Miss. R'y Co. v. Dickerson*, 59 Ind. 317.

COMPARATIVE NEGLIGENCE is a doctrine based upon the relative care, or absence of care, of the parties. All the surrounding circumstances of each particular case are to be taken into consideration. The question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties. The true doctrine is, that the degree of care required by the plaintiff is in inverse proportion to the negligence of the defendant, — the greater the negligence shown by the defendant, the less will be the degree of care required by the plaintiff to entitle him to recover: *Galena and Chicago Union R. R. Co. v. Jacobs*, 20 Ill. 478.

PERSON TRAVELING ON FREE PASS does not assume any risks arising from gross negligence of the company: *Indiana Central R. R. Co. v. Mundy*, 83 Am. Dec. 339.

HARRIS v. BANK OF JACKSONVILLE.

[22 FLORIDA, 501.]

EVIDENCE. — The death of one of the parties to a receipt, acceptance, or other writing, precludes the survivor from testifying against the assignee or representative of the decedent, with respect to an alleged alteration thereof, although the decedent acted on behalf of a partnership, provided his copartners were not present at the time the writing was executed, and therefore can give no evidence with respect thereto.

SURVIVING PARTY TO TRANSACTION WILL NOT BE PERMITTED TO TESTIFY against a deceased party or his assignee or representative, on the ground that others were jointly interested with the decedent in the transaction, if none of them participated in the transaction, or are able to testify concerning it.

WHERE WRITING IS INTRUSTED TO ANOTHER WITH BLANKS TO BE FILLED, he has no authority to so fill them as to vary or pervert the scope or meaning of the words previously written or printed, nor to strike out

any of the written or printed words, and replace them with others of a substantially different signification.

BURDEN OF PROVING ALTERATIONS IN WRITING AFTER ITS EXECUTION rests upon him who alleges it; but the burden shifts from him to his adversary, if the writing, on being produced, appears to have been altered in any substantial particular.

APPARENT AND MATERIAL ALTERATION IN WRITING MUST BE explained by the party who offers it in evidence.

THERE IS NO APPARENT ALTERATION OF PAPER where there is no interlineation, erasure, difference in handwriting, change of figures or words, nor any irregularity on the face of the paper calculated to arouse suspicion. An alteration of a bill is not presumed because the words, "Payable at Metropolitan Nat. Bank, New York City," are written across the bill in the handwriting of the drawer, and above the acceptance.

BILL in equity by appellant, Harris, to compel the surrender and cancellation of a certain draft, and to enjoin an action at law pending thereon. Appellant claimed that the draft was given by him for the surrender of a preceding draft drawn on him at Citra, Florida, by H. P. Robinson and Brother, and of which he was an accommodation acceptor. He now claimed that his acceptance had been substantially altered by writing over it the words "Payable at Metropolitan Nat. Bank, New York City." The draft, including these words, was in the handwriting of C. F. Robinson, who was deceased at the time of the trial, but who at the time of the drawing and accepting of the draft was a member of the firm of H. P. Robinson and Brother, and the only member who knew anything about such drawing and accepting. After a trial, complainant's bill was dismissed.

Fleming and Daniel, for the appellant.

A. W. Cockrell and Son, and J. M. Barrs, for the appellees.

By Court, **RANEY, J.** The acceptance by appellant of the bill of exchange of February 20, 1884, though in law a transaction between him and both members of the firm of H. P. Robinson and Brother, was in fact conducted between him and the deceased member, C. F. Robinson, who, though acting for his firm, was the only one of them who actually participated in the negotiation and consummation of the transaction with the appellant.

The act of 1874, chapter 1983, section 24, page 518, of McClellan's Digest, after declaring that no person shall be excluded as a witness by reason of his interest in the event of the action, or because he is party thereto, enacts, in the form of a proviso, "that no party to such action, or person interested

in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and the person, at the time of such examination, deceased, against the executor, assignee, or survivor of such deceased person, but this prohibition shall not extend to any transaction or communication as to which any such assignee shall be examined on his own behalf, or as to which the testimony of such deceased person shall be given in evidence."

It is claimed by appellant, who was complainant in the lower court, that at the time he accepted the bill of exchange the words, "Payable at Metropolitan Nat. Bank, New York City," which now appear immediately above what he charged to be in fact his acceptance on the face of the paper, were not on it, but that they have been added since, and that the acceptance made by him was in the following language: "Accepted, James A. Harris," and none other. As the bill of exchange now stands, the acceptance is in the language quoted in this paragraph.

The acceptance of this paper was, barring for the present the effect of the fact that C. F. Robinson was acting in behalf, not only of himself, but also of a partner who is still living (a point to be considered hereafter), a "transaction" with a deceased person, within the meaning of the statute, and it seems clear that Harris is excluded from testifying as to any addition to or alteration of the acceptance having been made. The acceptance is the transaction, and to testify as to what were its real terms is unquestionably testifying as to the transaction between Harris and a person who was dead when Harris was examined as a witness, and as to which no one else in fact participated in transacting. In *Raubitschek v. Blank*, 80 N. Y. 478, where there was an exchange of lands between Herdfelder and Blank, Blank gave Herdfelder a check for the amount of the difference in value, and Herdfelder gave Blank a receipt, and Herdfelder assigned the check to Raubitschek, and died prior to the trial, it was held that Blank was incompetent to testify on the trial as to the transaction between him and Herdfelder. In *Boughton v. Bogardus*, 35 Hun, 198, an action brought to recover the value of services rendered by the plaintiff, a female, to defendant's intestate prior to February 7, 1882, the plea was payment. Upon the trial before the referee, the

defendant produced a receipt executed by the plaintiff, by which she acknowledged the receipt of fifty dollars from the intestate *in full of all demands, of whatever nature or kind, up to date, February 11, 1882*, and proved that she had delivered it to the deceased. The plaintiff was then allowed, against the defendant's objection, to testify that the words italicized had been added since she signed and delivered it to the intestate, and were not there when she signed it; but the supreme court, on appeal, held the testimony to be inadmissible, as it related to a personal transaction between the witness and the deceased. The execution and delivery by the plaintiff to the deceased of the receipt were declared to be clearly a personal transaction between herself and the deceased. In *Foster v. Collner*, 107 Pa. St. 305, the decision was, that where a note in suit is in the same condition at the trial as at the death of the assignor, the assignee cannot testify that it is now partly in pencil: *Smith v. Burnet*, 35 N. J. Eq. 314; *Louis's Adm'r v. Easton*, 50 Ala. 470; *Pease v. Barnett*, 30 Hun, 525.

There can be no doubt that an attempt to show by Harris that the alleged addition was made to the acceptance would be within the prohibition of the statute, if C. F. Robinson, with whom he actually dealt, had been solely interested, and acting for himself only, on his side of the transaction. If he would be a competent witness to testify as to the terms of the acceptance, and, consequently, an alteration thereof in one particular, he would be competent to do so as to a change in any other particular,—to make it conditional, or even to destroy its effect altogether.

Does or should the mere fact that at the time of this transaction there was another person jointly interested with C. F. Robinson, and jointly bound by his acts, exempt Harris from the exclusion which the statute places upon him in a case where no third person would be so interested in or bound by the dealings of Robinson? The theory of the proviso to the statute is, that where one of two persons, whose mouths have been opened by its general provision to testify as to a transaction between them, has been taken away by death, the mouth of the survivor should be closed also as to such transaction against the executor or other representative of the deceased person, or his assignee or other person claiming through him, until or unless the executor, assignee, or other person representing or claiming under such deceased person shall himself testify as to such transaction, or, having preserved the

testimony of such deceased person as to it, shall use it in evidence.

To the living party to the transaction it prescribes perpetual silence as against the representatives of the dead, and his assignee or others claiming under him, unless such representative or assignee or other claiming under him shall himself elect to testify as to such transaction, or to introduce the testimony of the deceased as to it. What the living knows or would testify is excluded because what the dead would testify if living cannot be or is not given in evidence; or because his representative or assignee is not himself so acquainted with the facts of it as to encourage him to go upon the stand; this is the underlying principle of the exclusion: as one is not confronted by the other, the former is restrained from saying anything. The temptation to misrepresentation and perjury in such cases, however superior many might prove to it, was doubtless thought by the legislature to be too great to permit the survivor to speak; the interest of those claiming under the deceased, if not the ordinary principles of fairness, was thought to demand the protection of such silence, unless and until they should themselves elect to testify, as to the transaction, or to introduce the deceased's testimony as to it. In case the executor or assignee testifies as to the transaction,—tells under oath what he may know about it,—or in case he introduces the evidence of the deceased as to it, his doing so is deemed by the statute a sufficient reason for admitting the survivor of the parties to such transaction to testify; because in the one case such survivor would encounter what such executor or assignee may know of the transaction, and in the other case he is confronted by the statements of the deceased as to the facts and circumstances of the same transaction which he will detail his own account of; and in both cases such executor or assignee, or other person of a like class, exercises his privilege with a full knowledge of its letting in the survivor to testify and of even the possible consequence thereof.

In no way does the fact that a third person, having no actual participation in the transaction, has a joint interest with the deceased person supply the same or like guaranties of the attainment of the truth, or of the protection of those claiming under the deceased, that the exceptions to the excluding terms of the proviso gives. Such joint interest has not been made an exception to the proviso, though others were

made. It would be hard to conceive a sound reason why the survivor should testify in his own behalf as to a transaction conducted by him and the deceased alone, simply because a third person was interested with the deceased party, and yet be excluded from testifying as to another transaction conducted in the same manner, but in which he and the deceased alone were interested. The fact of such joint interest has, to our minds, in itself, no effect upon the question whatever; and, upon principle, we think Harris was incompetent to testify, and was properly excluded, nor are we without authority upon the subject.

In *Hunter v. Herrick*, 26 Hun, 272, Hunter sued Herrick, executor of Carlton W. Herrick, deceased, who, with one Vanderburgh and another, had been partners under the style of L. Vanderburgh & Co., and had made the promissory note sued on. Vanderburgh was called as a witness by plaintiff, and interrogated as to a conversation between himself and defendant's testator in reference to the formation of the alleged partnership, and it was objected to as being a personal transaction between Vanderburgh and the deceased. The supreme court held it was such, and that Vanderburgh, being "interested in the event of the action," could not testify. In *Hildebrant v. Crawford*, 65 N. Y. 107, where it was claimed that Hildebrant's conversation was with Ridder, a deceased partner of Crawford, but was decided in fact not to be so, it was said: "If it was clearly shown that the conversation pointed at was between Ridder and Hildebrant in any proper sense, there might be force in the objection" that it was a personal transaction, and inadmissible.

In *McWhorter v. Sell*, 66 Ga. 139, where A sold to B his interest in a note of C, payable to the firm of A and B, and then died, it was held that C was not a competent witness in a suit by B to prove payment to A: See 13 U. S. Digest, N. S., p. 946, sec. 41.

The presence of disinterested parties at the time of the transaction, as to which it has been sought to have the survivor testify, is shown by the following cases not to save him from the excluding effect of the proviso: *Brague v. Lord*, 67 N. Y. 495; *Kraushaar v. Meyer*, 72 Id. 602.

2. It is contended by appellant that the bill of exchange bears upon its face presumptive evidence of the alleged alteration without the authority of Harris. As drawn, directed to "James A. Harris, Citra, Florida," he says it was payable at

that place, yet the writing across the face made it payable at a different place, and this is in a different handwriting from that of Harris.

The cases cited in support of this point are *Angle v. N. W. Mutual L. Ins. Co.*, 92 U. S. 330, and *Desbrow v. Weatherley*, 6 Car. & P. 758.

In the former case it was held that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument; and also that the material alteration of a written instrument, without authority, renders it void. The printed form, signed in this case in blank by the plaintiff, seems to have been as follows: "Pay to ——— dollars, on account of ———, in drafts to the order of ———." He signed his name immediately after and close to the last word. The party to whom it was delivered so signed erased the words "drafts to the order of," and inserted, preceding the erasure, the words "current funds." It was held that, though the delivery authorized the filling up the blanks in any manner consistent with the terms of the form, yet it did not permit the erasure and change as to the mode of payment, as the language, "in drafts to the order of," was an expression of the signer's will and direction in the premises, and wholly inconsistent with a payment in funds. As to whether the order in this case bore upon its face the marks of its infirmity, it is said: "Actual notice in such a case is not required, even in suits founded upon negotiable securities where the evidence of its infirmity consists of matter apparent upon its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased so as to be inoperative, were still entirely legible, even to the casual reader, and that the words 'current funds,' inserted before the erased word 'drafts,' were plainly repugnant to the erased words 'drafts to the order of,' which followed them in the same connection."

Desbrow v. Weatherley, *supra*, was a case at *nisi prius* before Tindal, C. J. The bill of exchange sued on was drawn by Williamson on the defendant, who accepted it, and Williamson indorsed it to the plaintiff. Under the words "Accepted,

H. O. Weatherley," were written, but not in the defendant's handwriting, the words "Payable at Messrs. Ashleds and Sons, 135 Regent Street." The bill appeared upon its face to have been changed from "five" to "six" months as to time of payment.

Williamson, having been called as a witness by the plaintiff, swore that he drew the bill himself, and that defendant accepted it for his accommodation, and handed it over to plaintiff, and received £350 from him, and that the bill had not been altered since it was accepted. With respect to the words "Payable," etc., he said that he could not state whether they were written before or after the defendant accepted the bill, but he thought they were written on the same day; yet he would not swear that they were not written on a subsequent day. The chief justice, after speaking of the alteration of the time of payment, said: "But there is another which, on the testimony of Mr. Williamson, was made after the acceptance, though he will not say exactly when it was done. I allude to the words 'Payable,' etc. This being an alteration after the acceptance, or at the time, it is incumbent on the plaintiff to show that it was made with the consent of the party accepting," etc.

In the former case, the evidence of alteration and erasures on the face of the instrument were enough to put the party upon inquiry; in the latter, it is plain that the chief justice understood the testimony of Williamson as meaning or establishing that the words "Payable," etc., had been added after the signing of the acceptance, but whether immediately following, or how long after, was uncertain. Besides the peculiar position of the questioned words, there was extraneous evidence of an alteration having been made.

Where the acceptor, sued upon a bill of exchange, alleges in his plea that it has been altered materially and without his authority since he accepted it, the burden is upon him to prove the particular alteration set up in his plea; and such is unquestionably the rule, where, in a case like the present, the acceptor becomes an actor in a court of equity for the purpose of obtaining a decree for the cancellation or surrender of the acceptance on the ground of such alteration, and the answer of the holder of it at least puts in issue the alteration, though it may be not in such form as to be evidence, and require the testimony of two witnesses, or of one, and a corroborating circumstance, to overcome it. The production of the bill of ex-

change in evidence will, if the alteration is apparent upon its face, make a *prima facie* case for the acceptor, and throw the burden upon the holder, to show that it was made before it was accepted, or if since, by the acceptor's authority. If there is nothing upon the face of the instrument to indicate an alteration, then the allegations of the acceptor must be proved by extraneous testimony. The party producing and claiming under the paper is bound to explain every apparent and material alteration; if it appears to have been altered, he must explain this appearance; if there is apparent upon its face any mark of or ground for suspicion, he must remove the suspicion; but if, on the other hand, however material in fact the alteration of the bill may be, there is, upon its face, no evidence or mark raising a suspicion thereof, the holder is not called upon to make an explanation on the mere production of the bill, or to introduce any testimony until the alteration has been shown by sufficient evidence outside of the paper. In *Meikel v. State Savings Institution*, 36 Ind. 355, it was claimed that the words "at the First National Bank of Indianapolis" had been inserted in the body of the note since defendant had signed and delivered, but there was upon its face no indication of any alteration, and it was held that where a defendant alleges an alteration of the note after it has been signed, and there is no indication of such alteration on its face, the burden of the issue is upon the defendant: 1 Greenl. Ev., sec. 364, and notes; *Davis v. Jenny*, 1 Met. 221; *Wilde v. Armsby*, 6 Cush. 314; *Chism v. Toomer*, 27 Ark. 108; *Elbert v. McClelland*, 8 Bush, 577; 2 Daniel on Negotiable Instruments, secs. 1417 et seq.; Byles on Bills, 492; *Hills v. Barnes*, 11 N. H. 395.

In the case at bar, it is admitted that C. F. Robinson, the deceased partner, had the management of the financial business of the firm, and that the draft in question, and another of the same date and amount but payable in six months, are in his handwriting, except the printed parts thereof, and excepting the words "Accepted, James A. Harris," which are in appellant's handwriting. It is also admitted that the words in the handwriting of Harris are written in red ink. What evidence of any alteration, or mark of suspicion thereof, is there upon the face of this bill? There is no interlineation, no erasure, no change or correction. The words "Payable at Metropolitan Nat. Bank, New York City," written across the face of the bill, are in the same handwriting—that of C. F.

Robinson—as the other written parts of the bill, except the words “Accepted, James A. Harris,” which are right under them, and in the handwriting of Harris. If the above words, constituting the alleged alteration, were in the handwriting of a third party, it would be a suspicious circumstance; but being in that of the same party who wrote the bill, and standing immediately over the writing and signature of Harris, we are unable to see anything in the appearance of the bill that indicates that it has been altered, or that, in the light of authority, can be held to be an apparent alteration. In all the cases where the alteration has been held apparent, which diligent search upon our own part and the industry of learned and zealous counsel has produced, there has been an interlineation, erasure, difference of handwriting, change of figures or words, or some irregularity calculated to arouse suspicion, on the face of the paper. Here we have nothing of the kind; not even that of the questioned words being below the signature, as was the fact in *Desbrow v. Weatherley*, *supra*, and which, on account of its irregularity, may be a sufficient circumstance to put the holder or person taking the paper upon inquiry; but the words objected to are above his signature, and in such case, the presumption is, that they are adopted by his signature, or in other words, legally his act, unless there is something in their appearance to indicate the contrary: *Davis v. Jenny*, 1 Met. 221; 49 Am. Dec. 554.

In *Simpson v. Stackhouse*, 9 Pa. St. 186, the place of payment was in a different handwriting from the body of the bill, which had been written by the defendant, and it was held that there was a presumption of an alteration; and in the other cases cited in that opinion there are other similar suspicious circumstances. In *Jones v. Ireland*, 4 Iowa, 63, the words “ten per cent” were in the same handwriting as the body of the note, but in blue ink, whereas the body of the note and the signature were in black ink. The defendant, the maker of the note, had signed, but had not written any other part of it. It was held that no suspicion requiring the plaintiff to show that the words in blue ink were made by authority of the maker was cast upon the note. In *Wilson v. Harris*, 35 Id. 507, a portion of the indorsement signed by the defendant was in a different ink and handwriting from the remainder, but this was held not to afford such a *prima facie* evidence of a fraudulent alteration as to require the plaintiff to explain them.

There is nothing to justify us in holding that the questioned words were not written before Harris accepted the bill; nor is there anything extraordinary or suspicious in the form of the bill. The fact that Harris wrote in red ink is not evidence of any subsequent alteration of the instrument.

3. The testimony of the appellant as to the alleged alteration of the acceptance being inadmissible, and there being upon the face of the draft no evidence of such alteration, and as there is in the record no other testimony to support the allegation of such alteration, the decree must be affirmed, and it is unnecessary to consider any other questions than those disposed of above.

The decree is affirmed.

WITNESSES IN ACTION AGAINST ADMINISTRATOR. — Under section 1880 of the California Code of Civil Procedure, the application of the rule includes nominal parties to the action: *Blood v. Fairbanks*, 50 Cal. 420; but has no application to a party claiming a family allowance: *Estate of McCausland*, 52 Id. 568. See also *Sedgwick v. Sedgwick*, 52 Id. 336; *Chase v. Evoy*, 51 Id. 618; and *Meyers v. Reinstein*, 6 West Coast Rep. 635.

ALTERATION OF NEGOTIABLE INSTRUMENT. — The addition of the words "with interest" to a promissory note, though made with the consent of one promisor, totally avoids it as to the other promisor: *Fay v. Smith*, 79 Am. Dec. 752. An alteration making a bill or note conform to an agreement between the parties will not vitiate the instrument: *Williamson v. Smith and Walker*, 78 Id. 478.

INSERTING WORD "AND" BETWEEN SIGNATURES OF TWO PARTIES TO NOTE does not change the liability of the makers, and is not such an alteration of the note as will prevent a recovery on it: *Martin v. Good*, 74 Am. Dec. 546.

WHERE WORDS "IN GOLD" WERE INSERTED IN NOTE after the words "loaned money," the legal liability of the makers not being changed, the alteration is immaterial: *Bridges v. Winters*, 97 Am. Dec. 443.

SPOILATION OF INSTRUMENT BY STRANGER WITHOUT KNOWLEDGE OF PARTIES does not affect rights or liabilities: *Piercol v. Grimes*, 95 Am. Dec. 673.

MATERIAL ALTERATION OF NOTE BY PAYEE, unauthorized by maker, but made without fraud and under mistake, avoids the note, but leaves the debt unpaid, and the payee may recover it: *Lewis v. Schenck and Smith*, 90 Am. Dec. 631.

JOINT AND SEVERAL PROMISSORY NOTE, SIGNED BY TWO PERSONS AS MAKERS, is materially altered by the addition of the name of another person, without the knowledge of one of the makers, — *secus* if the note be several only: *Brownell v. Winnie*, 86 Am. Dec. 314. See also *Vogle v. Ripper*, 85 Id. 298. The subject of alteration in writings is treated in notes to *Woodworth v. Bank of America*, 10 Id. 267-273; *Palmer v. Sargent*, 25 Am. Rep. 481-484; *Blakey v. Johnson*, 26 Id. 254; *Fuller v. Green*, 54 Id. 600.

LOGAN v. LOGAN.

[22 FLORIDA, 561.]

JUDGMENT CREDITOR—FRAUDULENT CONVEYANCE BY DEBTOR.—A judgment creditor has the right to proceed to an execution sale of property which the debtor had fraudulently mortgaged, but such right does not prevent his resorting to equity to cancel the fraudulent instrument.

WHEN CREDITOR SEEKS AID OF COURT OF EQUITY for the satisfaction of a judgment out of the property of his debtor, the title to which property has been in the debtor, but has been fraudulently transferred, it is sufficient for the creditor to show a judgment at law and execution to entitle him to resort to equity to vacate such fraudulent conveyance.

CREDITOR HAS NO RIGHT OF ACTION against the parties procuring the fraudulent conveyance to be executed, for their conduct in so doing, but he can successfully attack the conveyance for fraud apparent upon it, by which his rights are affected.

ILLEGAL ACTS PREJUDICIAL TO RIGHTS OF OTHERS are frauds on those rights, although the parties are innocent of any intention to commit a fraud. If the act is in effect a fraud upon the creditor, the motives of the parties are of no consequence.

MORTGAGE OF STOCK OF GOODS IN TRADE, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion in the usual course of his business, is essentially fraudulent as to creditors of the mortgagor, even though the agreement permitting such sales is not shown upon the face of the mortgage, but is proved *aliunde*.

BILL in equity to set aside a fraudulent mortgage.

John W. Malone, for the appellant.

Liddon and Carter, for the appellees.

By Court, McWHORTER, C. J. Complainant, William H. Logan, filed his bill against George A. Logan, Slade and Etheredge, Garrett and Sons, Pollock & Co., and the Eatherly Hardware Company.

The bill alleges a recovery of a judgment by the complainant against the defendant George A. Logan, in the circuit court of Jackson County, on the first day of December, A. D. 1884, for \$4,889.50, and the issue of execution thereon; that on the 21st of November, 1884, George A. Logan was induced by the fraud and deceit of the attorneys of Slade and Etheredge, and by their agent, to execute a mortgage on some real estate in the town of Greenwood, and a stock of merchandise then in store at the same place, of which he was in possession, to said Slade and Etheredge, Garrett and Sons, the Eatherly Hardware Company, and Pollock & Co.

The bill alleges also that a suit was pending in the circuit court of Jackson County, by Slade and Etheredge and their

co-mortgagees, against G. A. Logan, for the foreclosure of the mortgage; that such proceedings were had therein that an injunction had been granted restraining G. A. Logan from selling the goods otherwise than for cash, and requiring him to deposit the proceeds of such sale in the registry of the court; and further, that on the fourteenth day of February, 1885, the judge appointed a receiver to take charge of said stock of goods, and to dispose of them as directed.

The bill prayed that Slade and Etheredge and their co-mortgagees might be restrained from prosecuting their suit further, and that the same be dismissed, and all steps taken therein be vacated and nullified. The defendants Slade and Etheredge filed an answer to the bill for the purpose of resisting the issuance of the injunction prayed for, and also a demurrer to the bill on several grounds. The judge refused the injunction, and sustained the demurrer.

One of the grounds of demurrer was that the complainant had an adequate remedy at law. We do not think this ground is tenable. While he had an undoubted right to have levied his execution at any time before the court had taken the goods into its custody, by the injunction commanding George A. Logan to sell them and deposit the proceeds in the registry of the court, and by the further appointment of a receiver to take charge of and sell them, and while he might still have levied his execution by obtaining the permission of the court, upon a petition showing himself entitled to take such a course, yet the fraud alleged in the bill gave him also a concurrent right to come into a court of equity. Wait, in his treatise on fraudulent conveyances and creditor's bill, sec. 59, says: "A judgment creditor may proceed at law to sell under execution lands or property which his debtor has fraudulently alienated, which are subject to execution. The attempted transfer may be treated as a nullity, and the property subjected to seizure and sale upon execution, the same as though no covinous transfer had ever been made. The creditor, in such cases, may consider the debtor as still the owner of the property, and is entitled to purchase it in order to obtain satisfaction of the claim the same as if the title were unencumbered by the fraudulent deed or transfer": See also *Thomason v. Neeley*, 50 Miss. 313.

Further: "Fraud is one of the recognized subjects of equity jurisdiction, and is the most ancient foundation of its power. The existence, then, of the remedy at law does not interfere

with the right to resort to a court of equity for the vacation of the fraudulent conveyance as an obstacle in the way of the full enforcement of the judgment, and to remove a cloud on the title to the property": Wait on Fraudulent Conveyances, sec. 60.

"The suit in equity is sometimes said to be an ancillary relief in aid of the legal remedy, as a court of equity does not intervene to enforce the payment of debts": Wait on Fraudulent Conveyances, sec. 60.

It is also alleged as a ground of demurrer that the execution of complainant had not been returned to the clerk's office unsatisfied. The rule laid down by this court in *Robinson v. Springfield Company*, 21 Fla. 203, was to the effect that this was only necessary when the title to the property had never been in the debtor, but was held by another on a secret trust for him, or in case of an equitable asset which could not be levied on by execution at law. When the creditor seeks the aid of a court of equity for the satisfaction of a judgment out of the property of his debtor, the title to which property has been in the debtor, but has been fraudulently transferred, it is sufficient for the creditor to show a judgment at law and execution to entitle him to resort to equity to vacate such fraudulent conveyance.

The bill alleges that this mortgage was procured from G. A. Logan by a fraud practiced on him by the mortgagees and their attorneys. The defendants insist, and set it up as one of the grounds of the demurrer, that the fraud must have been participated in by both of the parties,—the mortgagor and the mortgagee; and that the fraud of the mortgagees in procuring it made the mortgage voidable, and not void, and only at the instance of G. A. Logan; that the creditor could not avail himself of this right of his debtor.

There is no doubt of the correctness of this proposition as insisted on by the counsel for the appellees. We think, however, that this doctrine is confined to the fraud practiced on the debtor to induce him to execute the mortgage. The mortgage being executed, and being free from all objections except the fraud in procuring it, the principle urged by counsel would apply. But this is not all the case made by the bill. In addition to the allegation that its execution was procured by fraud, it alleges that as to the stock of merchandise it was void, because "it contained no provision for said Logan to account for the sales of said property, but he had, by the terms

of said deed, every right and power to dispose of said merchandise to the detriment of your orator."

Of the fraud in procuring it to be executed the creditor cannot complain, but of the fraud inherent in the mortgage itself his rights as a creditor are involved, and he has such a right.

If the creditor cannot assail the mortgage for being fraudulently procured, when it is executed he can assail it for fraud apparent upon it, by which his rights are affected.

When we come to consider the mortgage itself, we do so on its own terms, and not with reference to what influences were exercised to induce the debtor to execute it. In thus considering it, if it in effect is a fraud upon the right of the creditor, the motives of the parties are of no consequence. The decisions on this point are numerous: See *Robinson v. Elliott*, 22 Wall. 518. "By the term 'fraud' the legal intent and effect of the acts complained of is meant. The law has a standard for measuring the intent of parties, and declares an illegal act prejudicial to the rights of others a fraud on such rights, although the parties deny all intention of committing a fraud": *Kirby v. Ingersoll*, 1 Harr. (Mich.) 172. And this principle was reaffirmed by the supreme court of Michigan, 1 Doug. 477, which found the transaction fraudulent without "imputing to the highly respectable parties in this case a premeditated or wicked intention to injure the interest of complainant." See also *Graham v. Chapman*, 12 Com. B. 85; *Wheelden v. Wilson*, 44 Me. 11; *Grover v. Wakeman*, 11 Wend. 187; 25 Am. Dec. 624. In this case, the court says the statute of frauds refers to a legal, and not to a moral, intent. Its legal intent is not to be gathered from the motives of the parties, but from the legal effect of their acts. If the allegation in the bill above quoted, that the mortgagor had by the terms of said mortgage every right and power to dispose of the merchandise, to the detriment of complainant, be true, and the demurrer admits its truth, we are of the opinion that the mortgage was void as to the creditors of G. A. Logan.

Mr. Pearce, in a treatise on mortgages of merchandise, pages 1 and 2, asks these questions: 1. Is a mortgage of a stock of goods in trade, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion in the usual course of his business, essentially fraudulent as to creditors of the mortgagor? 2. If it be, is it still so in case the agreement or understanding between the mortgagee and mortgagor, permit-

ting such sales, is not shown upon the face of the mortgage, but is proven by evidence *aliunde*?

He says further "that a candid and impartial investigation finds both these questions answered in the affirmative by the great weight of American authority, considering the decisions not only as precedents, but as enunciations of principle." See also *Robinson v. Elliott*, 22 Wall. 513, and the numerous cases cited in *Pearce on Mortgages of Merchandise*.

As to the real estate mentioned in the mortgage, or any other property included in it, the possession of which was to remain with the mortgagor, and which he had no right to sell at his discretion, there being no objection to the mortgage of such property except its being procured by fraud, and that, as we have seen, not being a fraud available to complainant, the mortgage was valid, unless the fraud as to a part of the property vitiated the whole,—a point which we do not decide.

The decree of the court sustaining the demurrer is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WHERE STRANGER TO EXECUTION IS IN POSSESSION OF PROPERTY, CLAIMING IT AS HIS OWN, by virtue of a transfer to him from the debtor, the officer must produce, not only the writ, but the judgment which authorizes its issuance; and a sale of property by a debtor cannot be attacked by a creditor merely because he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property: *Bickerstaff v. Doub*, 79 Am. Dec. 204.

WHEN FRAUD DOES NOT APPEAR ON FACE OF CONVEYANCE, either the insolvent condition of the grantor at the time of his making the deed, or an actual intent to defraud, will bring the conveyance under the operation of the statutes against fraudulent conveyances: *Filley v. Register*, 77 Am. Dec. 522.

JUDGMENT CREDITOR MAY RELY ON LIEN OF HIS JUDGMENT on real property, instead of resorting to equity, and a purchaser under an execution sale will have the right to impeach the debtor's conveyance as fraudulent: *Chautauque County Bank v. Risley*, 75 Am. Dec. 347.

JUDGMENT CREDITOR HAS RIGHT TO HAVE FRAUDULENT CONVEYANCE REMOVED and title cleared up by decree in equity before selling the property under his execution: *Cook v. Johnson*, 72 Am. Dec. 381.

JUDGMENT CREDITOR CANNOT MAINTAIN ACTION TO SET ASIDE ASSIGNMENT AS FRAUDULENT until after recovery of judgment and return of execution unsatisfied: *Gates v. Andrews*, 97 Am. Dec. 764.

ATTACHING CREDITOR WITH CONSTRUCTIVE NOTICE NOT RELEASED FROM OBLIGATION TO MAKE FURTHER INQUIRY, because he believed the mortgage to have been withheld from record to defraud creditors: *Allen v. McCalla*, 96 Am. Dec. 56.

CREDITORS NOT PARTIES TO PROCEEDINGS TO SET ASIDE CONVEYANCE AS FRAUDULENT cannot avail themselves of the adjudication: *Huntington v. Jewett*, 95 Am. Dec. 788.

AS TO WHEN VOLUNTARY CONVEYANCE WILL BE HELD FRAUDULENT, see *Redfield v. Buck*, 95 Am. Dec. 241; *Stewart v. Rogers*, 95 Id. 794.

ATTEMPTED FRAUDULENT CONVEYANCE OF ALL HIS PROPERTY BY DEBTOR is a waiver of right to have personal property levied on before real estate: *Stancill v. Branch*, 93 Am. Dec. 592.

BURROWS v. MICKLER.

[22 FLORIDA, 572.]

RIGHT OF APPEAL IS NOT WAIVED BY PAYMENT of the amount of the execution to the sheriff, to avoid a levy.

MOTION by defendant in error to dismiss the writ of error.

Doggett and Buckman, for the motion.

M. C. Jordan, contra.

By Court, RANEY, J. Mickler, the defendant in error, moves to dismiss the writ of error. He had a money judgment against Burrows, and the writ of *fi. fa.* was in the hands of the sheriff. The real grounds of the motion are, that the judgment and executions have been satisfied and voluntarily paid by Burrows, and that this was done before any *supersedeas* issued or was served. The motion is supported by the following return or certificate made by the sheriff on the execution: "I hereby certify that I received the within execution on the fifteenth day of August, 1885; executed the within writ in the following manner: On the twenty-eighth day of January, 1886, the defendant, to avoid levy hereunder, paid to the sheriff \$232.04, being the amount of the within judgment, costs, and interest to the fifteenth day of February, 1886; said amount so paid was paid under the following understanding and with the following agreement: That in the event a *supersedeas* should issue on or before the fifteenth day of February, 1886, in the within entitled cause, the amount so paid should be returned to said defendant, and in the event no *supersedeas* should issue on or before the fifteenth day of February, 1886, said amount to be applied to the full satisfaction of this execution. No *supersedeas* having issued on or before February 15, 1886, so much of said amount as satisfied said judgment as to the judgment, interest, and costs was paid to Doggett

and Buckman, attorneys for plaintiff herein; that afterwards defendant's attorney gave notice to the sheriff of the issuance of a *supersedeas*, since which time the sheriff has done nothing in the premises."

It is apparent that the purpose of Burrows, as shown by the above agreement between him and the sheriff, was, that the money put into the sheriff's hands by him should not operate as a payment of the execution until the sixteenth day of February, 1886, nor at all, if the *supersedeas* should be obtained on or before the fifteenth day of such month. There is no agreement either in form or effect not to take a writ of error. The writ lies without a *supersedeas*.

The case before us is in effect that the defendant in judgment and execution has paid the amount necessary to satisfy them. Counsel for the motion has shown no authority to support the idea that such payment by a defendant in execution amounts to a waiver of the right to have the judgment reviewed by appeal or writ of error.

Authorities cited by counsel opposing the motion, as well as all other decisions which we have found in our investigation, are to the effect that such payment does not waive this right: See *County Commissioners v. Johnson & Co.*, 21 Fla. 577; *Richeson v. Ryan*, 14 Ill. 74; 56 Am. Dec. 493; *Erwin v. Lowry*, 7 How. 172; *O'Hara v. McConnell*, 93 U. S. 150; *Gregg v. Forsyth*, 2 Wall. 56; *Close v. Stuart*, 4 Wend. 95; *Mayor etc. v. Riker*, 38 N. J. L. 225; 20 Am. Rep. 386; *Scott v. Conover*, 10 N. J. L. 61; *Randolph v. Bayles*, 2 Id. 49; *Anonymous*, 3 Id. 469. In *County Commissioners v. Johnston & Co.*, 21 Fla. 577, we held that the performance by respondents of the command of a peremptory writ of *mandamus* was not a bar to an appeal from the judgment awarding the writ. In *Putnam v. Churchill*, 4 Mass. 516, it was held even that an agreement not to appeal from a judgment did not preclude the taking of a writ of error. In *Richeson v. Ryan*, *supra*, it is said Richeson "was at liberty to pay off the judgment at once, and thereby prevent the accumulation of interests and costs. By so doing, he did not waive his right to remove the record into this court for the purpose of having the validity of the proceedings tested and determined."

The motion is denied.

PARTY PAYING JUDGMENT AGAINST HIMSELF BEFORE EXECUTION ISSUED does not thereby waive his right of testing its validity in the appellate court: *Richeson v. Ryan*, 56 Am. Dec. 493.

O'BRIEN v. VAILL.

[22 FLORIDA, 627.]

LAW IMPOSES ON INNKEEPER EXTRAORDINARY LIABILITY for the protection of the baggage of his guest. He can avoid it only on the grounds of the loss having been occasioned by the act of God, the public enemy, the misconduct of the guest, or of the friend he brings with him.

INNKEEPER'S LIABILITY AS SUCH CEASES when his guest pays his bill and departs, announcing that he would be gone a few days, but would leave his baggage to be cared for till his return. The innkeeper's subsequent duty is that of a gratuitous bailee of such baggage, liable only for gross negligence.

ACTION against innkeeper for damages for loss of baggage. **Verdict** for the plaintiff. Defendant appealed.

C. P. and J. C. Cooper, for the appellant.

Fleming and Daniel, for the appellee.

By Court, McWHORTER, C. J. On the 26th of March, A. D. 1885, plaintiff, O'Brien, went to the hotel of the defendant, E. E. Vaill, in the city of St. Augustine, and stopped there as a guest. The next day plaintiff paid his bill to the clerk in the office of the hotel, and told him he would be gone for a few days, but would leave his baggage, which consisted of two trunks and a valise, until his return, and which he requested the clerk to take care of for him. Plaintiff left his baggage in his room, locked the door, and gave the key to the clerk. Plaintiff told the clerk that on his return he would board with him. On April 2d plaintiff returned, and again became a guest of the hotel. The plaintiff's baggage had been removed by the proprietor to the main hall of the hotel. On inquiring for his baggage, it was found that one of the trunks had been stolen.

It was in evidence that the front door opened into the office, and there was no entrance into the hall besides the entrance through the office; that when the house was not closed there was always some person in charge of the office, and when the hotel doors were closed there was always a watchman on duty. A former servant of the hotel was arrested for the theft, and confessing the crime, told the officer where they could find the trunk. Two hasps had been broken, and the most of the contents carried away. Vaill, the proprietor, refusing to pay O'Brien for his damage and loss, the latter brought suit.

The questions presented upon these facts are,—1. Was Vaill, O'Brien having paid his bill and departed from the house, but leaving his baggage, saying he would return, liable to O'Brien under the law regulating the liability of an innkeeper to his guest for the loss of such baggage. Attorney for appellant has called to our attention the case of *Adams v. Clem*, 41 Ga. 65; 5 Am. Rep. 524. In this case, Mrs. Clem was the guest of the innkeeper, Adams; her trunk was carried to her room, and was marked with her name; she paid her bill, saying that a gentleman, whom she pointed out, would call in ten minutes for it, and bring it to her in the country, to which Adams assented. She left the inn on Monday, and no one called for the trunk until Friday, when it was found to be lost. The court held the innkeeper responsible.

The appellant also cites the case of *McDonald v. Edgerton*, 5 Barb. 560. This decision is partly based on the case of *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663. We think the court misconstrued Justice Bronson in the case of *Grinnell v. Cook*, *supra*. In that case, Judge Bronson drew a well-founded distinction in respect of the innkeeper's liability for property left by the guest, as to whether the innkeeper was to receive compensation for keeping the property during the absence of the guest. The guest had left a horse which required feed and attention, for which the innkeeper had a right to charge a reasonable compensation. In the case of *McDonald v. Edgerton*, *supra*, the plaintiff left behind his coat, and there was no compensation agreed on or expected for keeping it. Leaving property for which a compensation for keeping was to be paid continued the relation of innkeeper and guest so far as that property was concerned.

We think the current of authority and the weight of reason is opposed to the conclusion reached by the supreme court of Georgia, and the supreme court of New York in 5 Barbour, *supra*.

The law imposes on an innkeeper an extraordinary liability for the protection of the baggage of his guest. He can avoid it only on the grounds of the loss being occasioned by the act of God, the public enemy, the misconduct of the guest, or the friend he brings with him. We can think of no other reason for the imposition of this liability upon the innkeeper than the profit he receives from entertaining his guest. When the traveler ceases to be his guest, and the innkeeper ceases to derive a profit for his entertainment, the relation of innkeeper and

guest have ceased as such, and, as a consequence, their relative liabilities.

O'Brien, when he paid his bill and left the hotel, put an end to the relation of guest to the hotel-keeper: See *Miller v. Peebles*, 60 Miss. 819; 45 Am. Rep. 423; *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663.

The expectation to become a guest again at some other time did not continue the relation of innkeeper and guest.

The next question is, What was the relation of the parties after the cessation of the relation of innkeeper and guest, as shown by the evidence? We think it was that of bailor and bailee, and that the defendant was a gratuitous bailee. The statement of the appellant that he expected to return to and board at the hotel could not be considered as a consideration for taking care of the baggage. A gratuitous bailee is liable only for gross negligence. There is nothing proved in the case that will justify us in the conclusion that defendant was guilty of such negligence in opposition to the finding of the referee.

The judgment is affirmed.

AFTER GUEST HAS GIVEN UP HIS ROOM AT INN, and closed his connection therewith, the landlord is liable only as a common bailee for the guest's baggage left behind at the inn: *McDaniels v. Robinson*, 62 Am. Dec. 574, and 67 Id. 720; *Miller v. Peebles*, 45 Am. Rep. 423, and note.

INNKEEPER IS BOUND TO KEEP SAFELY AND WELL PROPERTY OF GUESTS, and in case of loss or injury, can absolve himself from liability only by showing that the loss or injury was without his fault: *Johnson v. Richardson*, 63 Am. Dec. 369; *Dumbier v. Day*, 41 Am. Rep. 772, and note.

INNKEEPERS ARE LIABLE, WITHOUT REGARD TO ACTUAL FAULT OR NEGLIGENCE, for loss of baggage of guest, custody of baggage being assumed as part of service: *Pettigrew v. Barnum*, 69 Am. Rep. 212.

INNKEEPER, DEFINITION OF: *Houth v. Franklin*, 73 Am. Rep. 218.

INNKEEPER MAY EXCULPATE HIMSELF by showing that loss did not happen by any neglect of his: *Laird v. Eichold*, 71 Am. Dec. 323. Relation of innkeeper and guest, when exists: *Hancock v. Rand*, 46 Am. Rep. 112, and note. Innkeeper is not answerable where property is destroyed without his negligence by accidental fire: *Cutler v. Bonney*, 18 Id. 127, and note 130-136.

WESTERN UNION TELEGRAPH COMPANY v. HYER BROTHERS.

[22 FLORIDA, 637.]

TELEGRAPH COMPANY, LIABILITY OF — MEASURE OF DAMAGES. — A telegraph company is liable for damage resulting naturally, and in the usual course of business, from its failure to send or deliver a dispatch correctly and promptly, without requiring the sender to disclose its importance to the company or its agent.

CIPHER DISPATCH. — It is of no consequence whether the dispatch is in plain English or in cipher, provided such cipher is written in the letters of the English alphabet.

ACTION against telegraph company for damages occasioned by delay in delivering cipher message. The jury found a verdict for the plaintiff. Defendant appealed.

W. A. Blount, for the appellant.

S. R. Mallory, Jr., for the appellee.

By Court, McWHORTER, C. J. Suit was brought by Hyer Brothers, in the circuit court of Escambia County, against the Western Union Telegraph Company, for damages for non-delivery of a cablegram sent to them at Pensacola by their correspondent and agent at Barbadoes.

The proof showed that the plaintiffs were merchants and ship-brokers at Pensacola, and that on the twelfth day of September, 1883, they received a cablegram from their correspondent and agent at Barbadoes, as follows: "Prelate, Tellespont, lambent, speculum, divan, extol, pulpit, rabidy, Greenock, preferred, sluggard, excluded, stevedore, 'scam,' 'slam,'" which, being translated, meant: "We grant you refusal for 24 hours. Tellespont, 556 6-100 reg., half hewn, balance deals, £6.15, full freight on beam fillings. U. K., Greenock preferred, £20 gratuity, stevedore excluded. Commissions in thirds." Hyer Brothers answered the cablegram as follows: "To Laurie, Barbadoes. Wagon, extant, knight, sluggard, polygon," which, being translated, meant: "For United Kingdom, full cargo sawn timber at £6 10s. per standard, and £20 gratuity, usual charter."

The agent at Barbadoes answered this dispatch, and the answer was received at the office of the Western Union Telegraph Company in Pensacola, September 14th. It contained

but one word: "Punctual." By the cipher code used by Hyer Brothers and their correspondent it meant: "We have closed the vessel as per your telegram." It was never delivered to Hyer Brothers. The offer of H. B. for the charter of the vessel was based on an offer made to them by A. M. McMillan, of Pensacola.

Not receiving an answer to their dispatch, and thinking their offer was not accepted, they told McMillan that the offer was declined, and he secured another vessel. On October 2d the vessel arrived at Pensacola, bringing a letter from their agent at Barbadoes containing a copy of the telegram, which had been sent as aforesaid to H. B., but not delivered; also a charter-party which their agent at Barbadoes had signed for them in accordance with their offer. They had to recharter the vessel at a loss.

The court instructed the jury to find their verdict as a special verdict, upon which, if in favor of the plaintiff, it should enter judgment for nominal damages, or for the amount of damages as found by the jury, as it might thereafter be advised. The jury returned a verdict for plaintiffs for \$618.90, and the said court, after being advised, entered judgment in favor of the plaintiffs and against the defendant for said sum.

The defendant alleges here as error that the court erred in rendering judgment for other than nominal damages.

This question has never before been presented for adjudication in this state.

The courts in New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada, and Maine, following the case of *Hadley v. Baxendale*, 9 Ex. 341, hold that only nominal damages can be recovered from the company undertaking to send the telegram, unless the sender should inform the operator of the special circumstances which constituted its importance, and the need of its correct and prompt transmission.

The case of *Hadley v. Baxendale*, *supra*, was this: The plaintiffs, owners of a steam-mill at Gloucester, had a shaft broken, and desiring to have another made, they left the broken shaft with the defendant, a common carrier, to be carried to a foundry at Greenwich to serve as a model for a new one. At the time of making the contract, the defendant's clerk was informed that the mill was stopped, and that the plaintiffs desired the broken shaft to be sent immediately, but were not informed of the special purpose for which the broken shaft

was to be forwarded. The carriers told the proprietors of the mill that they could deliver the shaft at Greenwich at a certain time. They failed to deliver it within the time, and a delay was caused in the making of a new one, and a consequent delay in starting the mill. The court said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

All the cases above referred to rely upon the authority of this case of *Hadley v. Baxendale*, 9 Ex. 341, and are decided upon the theory that the principles of law regulating the conduct of common carriers applies equally to the transmission of messages by the electric telegraph system. The business of one is to transport from one locality to another some tangible object of weight and dimension. Experience does not suggest, in such a transaction, any other liability than compensation for its value, if lost or destroyed in the transportation, or such

damages for its delay as the object itself might suggest. The business of the other is the transmission, from one to another and from one locality to another, of information or intelligence, — nothing in itself, but as the basis and groundwork that is to influence the conduct of others, is in this respect of the very first importance. One is limited to the transportation of tangible things; the other to the transmission of the intangible. There is no similarity in the services to be performed, in the nature of the things to be transported or transmitted, or the purposes to be effected, and as a consequence, none as to the measure of damages for failure to perform their respective agreements.

The decision in *Hadley v. Baxendale*, 9 Ex. 841, was proper, and suited to the facts before the court; but an attempt to extend it to such cases as this would be productive of great injustice. The telegraphic invention has made the system the means of communication between all civilized countries on the globe for a large part of the transactions and communications that prior to its invention were conducted by writing or by special messenger. No man can enumerate the vast number of subjects of treaty and intercourse that the complicated relations of mankind require its agency to accomplish. It can safely be said, however, that the larger part of all messages sent are of a commercial or business nature, which suggest value; the requirements of friendship or pleasure can await other means of less celerity and less expense. If this be true, why should the law assume that as a rule all messages sent over it are unimportant, and that an important one is an exception, of which the operator is to be informed? Whatever may be the rules of this particular defendant company, if they have any, there are none set forth in the record; whether, therefore, its rules are reasonable, or whether it can limit its liability by proper rules when shown to have been known to its patron, is in no sense involved in this opinion.

The common carrier charges different rates of freight for different articles, according to their bulk and value and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made

no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission, that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded, for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which in consideration thereof he had agreed to perform, and which the law in consideration of his promise and the reception of the consideration therefor had already enjoined on him. The system of telegraphy, founded as it is on a comparatively recent discovery of the practical capabilities of a well-known elementary force, whose existence had hitherto made itself known more by its power of destruction and the dread of its visitations than by manifesting utility for the varied purposes of man, and having for its mission the almost instantaneous communication of ideas between persons widely separated, as to distance, unlike any industry or enterprise that had ever been in use before, may justly be considered and treated as standing alone,—a system unto itself.

The nearest approach to any similar enterprise is the system of carrying letters by mail, but as this has been taken in charge and performed by the United States government since its inception, and its acts or omissions cannot be made subjects of judicial inquiry, we can find no precedent in this country to aid in the solution of the questions that are dividing the courts. The same may be said as to want of precedents in that country to which we have so often and so successfully looked for assistance in other disputed questions.

Prior to the reign of James I., when the post was first established in England, letters were sent by a messenger specially hired for the purpose, or intrusted to the honor of some wayfarer who chanced to be going to the place where the letter was desired to be sent. Butchers and drovers whose business of buying cattle caused them to visit various parts of the king-

dom were the principal carriers of letters, as late as the fifteenth century. Any attempt to apply to such a novel system legal principles adapted to pursuits and occupations which are dissimilar in their nature, and designed for the accomplishment of different purposes, must naturally result in failure and confusion. A recognition by the courts of this truth, and an application from time to time to its conduct of such rules and regulations as common sense may suggest, as fitted to its peculiar nature and purposes, without reference to systems that are not similar and principles that are not analogous, is the only method preserving the law regulating its operation from contradictions and perplexities. Similar difficulties have previously arisen in other branches of the law, when from their novelty, and a failure of applicable precedents, the courts, probably from fear of the hazard of framing new rules, or misled by a seeming analogy, have attempted to apply to such legal novelties long-used principles of law, and to analogize the new to some old system with which they were familiar. This disposition of the courts, or it may be said of the human mind, for it exists equally elsewhere, is very forcibly and conclusively shown in the effort, when the tenure of partners in the joint property of the partnership was a new question in the English courts, to liken it to a joint tenancy or a tenancy in common. This was the view, says Mr. Parsons, that was taken in all the early books. They all had the element of joint ownership of property, but in all other respects were different and independent, and the law for each should be sought for in itself. When this species of joint interest and ownership came under the cognizance of the courts of England, it was new to them, and new to the law of England, and it was perhaps unavoidable that they who administered the law should have sought to bring this new topic within the rules and principles of these kinds of joint ownership which were well known: Parsons on Partnership, pp. 2, 3. Much of the confusion, says the same learned author, existing to-day in suits and levies of a private creditor against a partner personally indebted to him is due to the inability of the law of partnership to clear itself of the last remaining influences of the old notion that partnership was but one form of tenancy in common: Id. 352, 353.

The supreme court of Alabama, in the case of *Daughtery v. American Union Telegraph Company*, at its December term,

1883, reported in the Alabama Law Journal, May, 1884, 75 Ala. 168, 51 Am. Rep. 485, and the supreme court of California, in the case of *Hart v. Western Union Telegraph Company*, April term, 1885, 66 Cal. 579, 56 Am. Rep. 119, have laid down a doctrine more harmonious with justice, and more applicable to the peculiar characteristics belonging to the system of telegraphy. They hold that a telegraph company is liable for damage resulting naturally, and in the usual course of business, from its failure to send or deliver a dispatch correctly and promptly, without requiring the sender to disclose its importance to the company or its agent.

It is of no consequence whether the dispatch is in plain English or in cipher, provided such cipher is written in the letters of the English alphabet.

The judgment of the circuit court is affirmed.

RANEY, J., dissented, and based his views upon the judgment of the court of exchequer in the case of *Hadley v. Baxendale*, 9 Ex. 341, decided in the year 1854, when the electric telegraph was in its earliest infancy. The facts disclosed in that action are stated in the opinion of the court in the principal case. The plaintiff was allowed special damages occasioned by the delay in delivering a mill-shaft. A rule *nisi* was obtained for a new trial, and after argument before the court in bank was made absolute, on the ground that the damages were too remote, and that the special circumstances under which the contract was actually made were not communicated by the plaintiffs to the defendant. "For," the court says, "had the special circumstances been known, the parties might have especially provided for the breach of contract, by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." In applying the principles laid down to the case, the court says: "We find that the only circumstances here communicated by the plaintiff to the defendant at the time the contract was made were, that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? . . . Here, it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier, under ordinary circumstances, such consequences would not in all probability have occurred, and these special circumstances here were never communicated by the plaintiff to the defendant. . . . The judge ought therefore to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages."

The decision in *Hadley v. Baxendale* overrules that in the case of *Borro-*

daile v. Brunton, 8 Taunt. 535, where damages of a similarly remote character were allowed, so that the decision of the majority of the court in the principal case would seem to be rather the revival of an old rule than the creation of a new one. The principle that damages may be recovered for loss of profits had been recognized in many English cases before *Hadley v. Baxendale*, among which may be cited *Kettle v. Hunt*, Bull. N. P. 78 a; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Ward v. Smith*, 11 Price, 19; *Waters v. Towers*, 8 Ex. 401; and *Bodley v. Reynolds*, 8 Q. B. 779. Mr. Justice Raney, in his dissenting opinion, has followed the view throwing on the sender of the telegram the burden of communicating its subject-matter and importance to the telegraph company before making it liable in damages for delay in transmittal of the message (citing a number of authorities in support), thus giving it an opportunity of making a special charge for, and taking special care in, the transmission of the dispatch, rather than the view which would impose upon the telegraph company the *onus* of requiring the sender to make the necessary communications as to the dispatch, and pay an increased tariff, if he wish to preserve the right to recover substantial damages in case of any delay in the receipt of the dispatch. The rule of the common law would seem to be that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed: *Robinson v. Harman*, 1 Ex. 855.

In the case of *Hart v. Western Union Tel. Co.*, 66 Cal. 579 (cited in the controlling opinion in the principal case), the judges differed in opinion; and it is the opinion of the minority which is in accord with the opinion of the majority in the principal case.

The case of *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, also criticises the ruling in *Hadley v. Baxendale*, and seeks to limit it to the particular facts of that case. The decision in *Daughtery v. American Union Tel. Co.*, *supra*, is a unanimous one, and contains a very copious collection of the authorities.

TELEGRAPH COMPANY IS LIABLE, NOT ONLY FOR COST OF SENDING MESSAGE, but also for the natural and proximate damages resulting from the breach of contract: *Parks v. Alta California Telegraph Co.*, 73 Am. Dec. 589. This is a California case, decided in 1859, when telegraph companies were held in that state to be common carriers; but since 1874, by section 2168 of the California Civil Code, such companies are not common carriers, but are required by the statute to "use great care and diligence in the transmission and delivery of messages."

DAMAGES OCCASIONED BY DELAY IN TRANSMITTING a dispatch, and which caused the sender to lose priority of an attachment, are not too remote: *Parks v. Alta California Telegraph Co.*, 73 Am. Dec. 589.

TELEGRAPH COMPANY MUST SEND VERY MESSAGE PRESCRIBED; and for a failure to do so is liable in damages to the receiver of the message, and such liability is not altered by the fact that the sender did not insure or have the message repeated: *New York and Washington Printing Telegraph Co. v. Dryburg*, 78 Am. Dec. 338.

CONDITION LIMITING RESPONSIBILITY, UNLESS MESSAGE REPEATED, is just and reasonable; and a sender, with knowledge of such condition, is to be regarded as having sent the message at his own risk: *Camp v. Western Union Telegraph Co.*, 71 Am. Dec. 461.

TELEGRAPH COMPANY NOT LIABLE FOR LOSS CONSEQUENT upon failure to send cipher message, unless purport of message communicated to company: *United States Telegraph Co. v. Gildersleeve*, 96 Am. Dec. 519.

AS TO WHEN TELEGRAPH COMPANY IS GUILTY OF GROSS NEGLIGENCE AND LIABLE IN DAMAGES for failure to transmit message, and measure of damages: *United States Telegraph Co. v. Wenger*, 93 Am. Dec. 751.

SECOND COMPANY CANNOT AVAIL ITSELF OF CONDITIONS IN BLANK OF FIRST COMPANY limiting liability: *Squire v. Western Union Telegraph Co.*, 93 Am. Dec. 157.

SPECIAL LIMITATION OF LIABILITY will not protect company from consequences of gross negligence: *Wann v. Western Union Telegraph Co.*, 90 Am. Dec. 395.

COMPANY BOUND TO TRANSMIT MESSAGE IN ORDER OF TIME OF RECEIPT; but private dispatches must give way to public communications: *Western Union Telegraph Co. v. Ward*, 85 Am. Dec. 462.

TELEGRAPH COMPANY IS RESPONSIBLE FOR ANY LOSS OR INJURY which results from its failure to transmit message: *Birney v. New York and Washington Printing Telegraph Co.*, 81 Am. Dec. 607.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

MITCHELL v. ATEN.

[57 KANSAS, 82.]

SERVICE BY PUBLICATION COMPLETED PRIOR TO DATE OF JUDGMENT gives jurisdiction.

JUDGMENT PREMATURELY ENTERED, as where the summons has been served but the time allowed by law to plead has not expired, is irregular merely, and not void.

IRREGULAR JUDGMENT CANNOT BE COLLATERALLY ATTACKED, though it may be set aside on motion or by some appropriate appellate proceeding.

PRIORITY IN RECORDING CONVEYANCES OF REAL ESTATE protects only innocent and *bona fide* purchasers and holders.

AGENT WILL NOT IN EQUITY BE PERMITTED TO PROFIT by his negligence toward his principal.

AGENT WILL NOT BE PROTECTED AS AGAINST HIS PRINCIPAL who is seeking to foreclose a mortgage on land which such agent has purchased from an innocent holder of a deed therefor, when the claim to priority under such deed is based on the negligence of the agent in delaying the recording of such mortgage.

ACTION to quiet title to real estate. Judgment for plaintiff.

A. J. Utley, for the plaintiff in error.

J. W. Lord, for the defendant in error.

By Court, HORTON, C. J. The facts in this case are substantially as follows: On November 23, 1858, William J. Turner was the owner of the real estate in controversy; upon that day he executed a mortgage upon the real estate to Henry Aten, to secure the payment of two hundred dollars, which mortgage was recorded on December 2, 1858; upon the same

day he conveyed to John N. Jefferson the real estate by warranty deed, which was recorded November 29, 1858. Henry Aten assigned his mortgage to C. M. Aten, who brought an action to foreclose the same, and recovered judgment thereon October 13, 1862. In that action William J. Turner and Henry Aten were made defendants. Under a sale upon the foreclosure of the mortgage, C. M. Aten obtained a sheriff's deed to the real estate, on December 12, 1863. David T. Mitchell obtained a warranty deed of the real estate from John N. Jefferson, on March 28, 1884. C. M. Aten filed his petition against David T. Mitchell for the purpose of quieting title in himself to said real estate. Upon the trial the court rendered judgment for the plaintiff, as prayed for. Mitchell excepted, and brings the case here.

The foreclosure proceedings in the action of C. M. Aten against William J. Turner *et al.* were received in evidence, without objection. After the argument of the case the plaintiff moved to strike from the evidence this record, for the reason that it was not signed by the district judge. This motion was sustained, and this ruling is complained of. The record was offered by Mitchell to prove that the judgment of foreclosure under which Aten claimed title was absolutely void. This upon the ground that the judgment was taken by default, on October 13, 1862, when defendants had twenty days after October 25, 1862, in which to appear and answer.

It is not necessary for us to pass upon the question whether the district court erred in refusing to consider as evidence the record of the foreclosure case of *Aten v. Turner et al.* Turner was notified by publication to appear and answer the petition on or before twenty days after October 25, 1862. The service of publication was completed prior to October 13th, the date of the judgment. Judgment was not rendered, therefore, until several days after service. Jurisdiction having been obtained, the fact that the judgment was rendered sooner than it should have been does not make the judgment void: a judgment thus rendered is irregular only. It might have been set aside by motion, or upon proceedings in error, but the judgment is not vulnerable to a collateral attack: Code, sec. 569; Freeman on Judgments, secs. 119, 126, 135; *Town of Lyons v. Cooledge*, 89 Ill. 529.

The next complaint is, that the findings of fact of the trial court do not support the conclusions of law. It is said that as the mortgage and the deed were both executed and acknowl-

edged November 23, 1858, and as there is no reference in the mortgage to the deed, or in the deed to the mortgage, it must be presumed, in the absence of proof to the contrary, that the grantees acted in good faith; and as it appears that the deed was recorded November 29, 1858, and the mortgage December 2, 1858, the prior record of the deed to Jefferson gave him the superior equity, and therefore that the mortgage never had any validity as to Jefferson, or to Mitchell claiming under him. If we were to presume that the mortgage and deed were delivered at the same time, it would necessarily follow that the grantees knew of the existence of the two instruments, and it would be a natural conclusion to say that Turner gave the mortgage first, and then sold the land to Jefferson with the understanding that he should pay the mortgage, as his warranty would oblige him to do. This view would be in favor of holding that Turner acted in good faith to all parties. But aside from this, the finding of the trial court that Mitchell was the agent of Aten in taking the mortgage from Turner, November 23, 1858, and was also his agent in recording the same, fully sustains the judgment rendered. The statute relating to the filing and recording of conveyances of real estate protects no one but innocent and *bona fide* purchasers and holders. If it be true that Jefferson had the superior equity on account of the priority of the record of his deed, he obtained this equity by the negligence or bad faith of Mitchell. It was the duty of Mitchell, as the agent of Aten, to have filed for record the mortgage within a reasonable time after it came into his possession. If Mitchell had done this, the mortgage would have been recorded within a day or two after November 23, 1858. It was not recorded, through the fault of Mitchell, until December 2, 1858, three days after the deed was of record. Mitchell cannot be permitted in a court of equity to profit by his own wrong against his principal. It is a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned.

We are not passing upon the rights or equities of Jefferson; therefore it is immaterial whether he had the superior equity in the real estate, or not. Mitchell, although he derived his title from Jefferson, cannot be protected by the priority of the record, because such priority is founded upon his own negligence or wrong. He should suffer for this negligence or bad faith, and not his principal.

The judgment of the district court will be affirmed.

JUDGMENT MAY BE ATTACKED COLLATERALLY, where the return of service of summons, as appears from the record, was insufficient to confer jurisdiction, and there was no finding of the court from which a proper service or appearance could be inferred: *Clark v. Thompson*, 95 Am. Dec. 457, and note 461.

JURISDICTION OF PERSON OF DEFENDANT may be obtained by service by publication: *Hahn v. Kelly*, 94 Am. Dec. 742. Presumption in favor of jurisdiction, when judgments of courts of record are attacked collaterally: *Id.*, and extended note 765.

BATES v. WIGGIN.

[37 KANSAS, 44.]

ORAL MORTGAGE. — Verbal agreement by one with his surety that property purchased with money raised by note signed by surety shall become the property of such surety until such note is paid, is, in effect, an oral mortgage.

ORAL MORTGAGE OF CHATTELS NOT ACCOMPANIED BY THEIR DELIVERY is valid as between the parties.

RECEIVER TAKES PROPERTY SUBJECT TO EXISTING EQUITIES AND LIENS.

SURETY MAY, AFTER MATURITY OF DEBT, for the payment of which he is responsible, replevy goods mortgaged to secure him as surety, and may foreclose such mortgage, although he has not actually paid such debt.

REPLEVIN by Frank A. Bates to recover of J. A. Wiggin, personally, and as receiver of H. B. Clark, certain personal property, consisting of hay and grain, amounting in value to \$1,439.75. H. B. Clark, in the fall of 1884, for the purpose of raising money with which to buy feed for certain live-stock then in his possession, made an arrangement with said Bates to become his surety on certain notes. The money to be obtained from such notes was to be used by said Clark in the purchase of feed, which, when bought, should become and remain the property of said Bates until such notes should be fully paid. Notes to the amount of two thousand five hundred dollars were given as agreed, with the proceeds of which feed was purchased, a portion of which was by said Clark fed out to the said stock until January 5, 1885, when J. A. Wiggin, as receiver in an action brought against Clark by one O. A. Burton, took possession of both the feed remaining and the stock, which possession he still retains. At the time the notes were given, both Bates and Clark were insolvent. Defendant demurred to plaintiff's evidence. The court sustained the demurrer, and directed the jury to render a verdict in favor of defendant. Judgment for defendant. New trial denied. Plaintiff *appeals*.

Lloyd and Evans, for plaintiff in error.

J. B. Johnson and J. D. McFarland, for defendant in error.

By Court, **HOLT, C.** The first question that presents itself is, Was the contract between Bates and Clark a conditional sale, or was it a mortgage on the property in controversy? The testimony is not uniform concerning the agreement. Some of the witnesses testify that the title should pass, and the property become absolutely the property of Bates at once. They all agree that the title to the property should be in Bates until the notes were paid to the bank, but there is some testimony showing that the title to the property remaining should revert to Clark upon the payment of the notes at once, and without any formal transfer. The testimony shows that Clark fed his stock out of a part of the property purchased. The writer of this opinion is inclined to believe that the agreement constituted a mortgage, yet there was testimony enough introduced tending to show that it was a conditional sale, so that it might have been a proper question for the jury to determine whether the transaction was a mortgage or a sale: *Goodwin v. Kelly*, 42 Barb. 194. If it had been a sale of the property, then certainly Bates, the owner of the same, could maintain his action for the possession of it.

The defendant contends that if it was an oral mortgage it would be void without an actual delivery of the property to Bates. We do not believe that claim is tenable. There is a distinction between mortgages and pledges, but there is no distinction nor reason for a distinction between oral and written mortgages in this respect. There is no provision in our statutes, as there is in some states, that the sale of personal property of a certain value, unaccompanied by delivery, shall be void unless a memorandum of the sale in writing be made and signed by one of the parties thereto. There is no question of purchaser or creditor arising in this action under the evidence brought here. It is simply a controversy between Bates and the receiver of H. B. Clark. Such receiver took the property of Clark subject to all existing equities and liens, and has no greater rights than Clark himself would have against Bates, and can interpose no defense that Clark could not: *In re North American Gutta Percha Co.*, 17 How. Pr. 549; *Lorch v. Aultman*, 75 Ind. 162; High on Receivers, sec. 138.

The testimony in this action tends to show that this transaction was entered into in good faith, and that the conditional

sale or mortgage, whichever it may be, was given upon a sufficient consideration; and when inquired into between the parties themselves, or between parties having no greater or different rights, we know of no rule, or reason for a rule, that would make delivery indispensable as between them any more than under a written mortgage: Jones on Chattel Mortgages, sec. 2; *Morrow v. Turney's Adm'r*, 35 Ala. 131. If a sale of chattels, not in writing, is valid without delivery, we know of no reason why an oral mortgage should be void between the parties thereto, without delivery.

In the view we take of this case, it is of very little importance whether the transaction was a conditional sale or a mortgage. If it was a mortgage, it was a transaction to secure \$2,500; and the statement of the values in the affidavit of the plaintiff shows the total value of the property claimed to be only \$1,439.75, much less than the amount sought to be secured.

It is contended that if this transaction is a mortgage, the plaintiff could not maintain an action of replevin for this property until he had paid the notes, or some part thereof, upon which he was surety. Whatever the general rule may be, we believe where the surety has a mortgage on the property of his principal to secure him for signing his principal's notes, after the maturity of the debt, he is not bound to wait until he has actually paid as surety, but may have the mortgage foreclosed at once; and where the principal is insolvent, he may retain any funds in his hands to apply to the discharge of his liability.

The purpose of this contract between Bates and Clark was to hold Bates harmless against loss or damage by reason of his signing Clark's notes at the bank as surety. At the commencement of this action he was legally liable on the notes, and was entitled to obtain possession of the property given him to save him harmless, because he signed the same: Brandt on Suretyship and Guaranty, sec. 193; Baylies on Sureties and Guarantors, 352; *De Cottes v. Jeffers*, 7 Fla. 284; *Succession of Montgomery*, 2 La. Ann. 469; *Daniel v. Joyner*, 3 Ired. Eq. 513.

It is recommended that the judgment of the court below be reversed.

PAROL MORTGAGE. — When it was intended that a vendor's lien shall become a mortgage on property sold, equity will so regard it, although there has been no technical mortgage: *Whiting v. Eichelberger*, 16 Iowa, 422.

EQUITY WILL ENFORCE PAROL MORTGAGE. Where it is agreed that a lien shall exist on real or personal property, equity will decree that such agreement, as against the party himself, or one taking under him with notice, raises a trust: *Whiting v. Eichelberger*, 16 Iowa, 422.

AGREEMENT TO EXECUTE MORTGAGE. — Money was advanced to defendant upon an agreement to execute a mortgage therefor, with an immediate power of sale. Defendant, after having received the money, refused to give the security. The court ordered that he should be held to the letter of his agreement: *Herman v. Hodges*, L. R. 18 Eq. 18.

ORAL MORTGAGES. — Oral agreements, the general substance of which is, that the creditor may retain or sell certain personal property of the debtor, and apply its proceeds to the satisfaction of a debt, may be very properly styled oral or verbal mortgages, and their validity and binding force as between the parties thereto seem to be very generally conceded: *Rees v. Coats*, 65 Ala. 256; *Loyd v. Currin*, 3 Humph. 462; *Couchman v. Wright*, 8 Neb. 1; *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290; *Bradwell v. Roberts*, 66 Barb. 433; *Ackley v. Finch*, 7 Cow. 290. No particular or set form of words is essential to the creation of such mortgage: *Glover v. McGilroy*, 63 Ala. 508. In all those states where a change or delivery of possession is essential to the existence of a valid written mortgage, it must necessarily be an accompaniment of a valid oral mortgage whenever it is sought to be enforced against any person other than the original mortgagor, and those acquiring under him, either by voluntary transfer or with notice of the existence of such mortgage: *Ceas v. Bramley*, 18 Hun, 187. When possession is delivered under an oral mortgage of personalty, the legal title vests in the mortgagee: *McTaggart v. Rose*, 14 Ind. 230; *Ferguson v. Union Furnace Co.*, 9 Wend. 345. If the mortgagee has never had the possession of chattels orally mortgaged to him, he may, even in those states where he is not regarded as vested with the legal title, maintain an action on the case against one who, having notice of such mortgage, converts such chattels to his own use: *Rees v. Coats*, 65 Ala. 256.

STONE v. FRENCH.

[57 KANSAS, 145.]

DELIVERY. — Deed of real estate, acknowledged by grantor, containing the words "signed, sealed, and delivered in the presence of S. Michaels," placed in an envelope in grantor's table-drawer, with directions as to recording indorsed on envelope, is neither delivered to the intended grantee nor to any one else, and it conveys no title.

INTENTION TO MAKE FUTURE DELIVERY OF DEED AND CONVEYANCE OF LAND AT DEATH of grantor is not a delivery of such deed, and passes no interest in the land.

DEED NEITHER DELIVERED NOR RECORDED by grantor during his lifetime is void.

VOID INSTRUMENTS CANNOT BE RECORDED legally.

RECORDING VOID DEED GIVES IT NO VALIDITY, and a *bona fide* purchaser, under such void deed, acquires no title, and can convey none.

ACTION for partition of land, brought by Luther C. French against John Stone and others.

Buck and Feighan, and Cox and Stratton, for the plaintiff in error.

Hutchings and Keplinger, for the defendants in error.

By COURT, VALENTINE, J. This was an action for the partition of two hundred acres of land in Neosho County, brought in the district court of that county on October 16, 1884, by Luther C. French against John Stone and others. The case was tried before the court and a jury, and judgment was rendered for the partition of the property, giving to the plaintiff, Luther C. French, one seventh thereof, and to the defendant John Stone one seventh thereof, and to the other defendants the remainder thereof. To reverse this judgment, the defendant John Stone brings the case to this court, making the plaintiff, Luther C. French, and all the defendants except himself, defendants in error.

It appears that on March 1, 1878, and prior thereto, the property in controversy belonged to Francis B. French, although he had not yet entirely paid for the same. At that time he formed the intention of giving this land at his death to his brother, Dudley S. French, unless he should sell the same during his lifetime. On March 1, 1878, he wrote a letter to his brother, Dudley S. French, in which he stated, among other things, the following: "In case I should drop off, you can take possession of the land, and do with it as you please. When I have paid the land out, if not sold, I will make a deed to it to you, inclose it in an envelope, direct it to you, to be mailed in event of death, which would make it sure to you without expense or trouble."

Nearly one year afterward, and on February 18, 1879, Francis B. French signed a warranty deed for the property to Dudley S. French, and on April 4, 1879, acknowledged the deed before S. Michaels, a justice of the peace in said county. The deed also contained the words "Signed, sealed, and delivered in the presence of S. Michaels." The deed, however, never was in fact delivered. On August 2, 1879, Francis B. French died, in the possession of and owning the land in controversy. During all this time he was a single man, and did not leave at his death any wife or child, or father or mother, but left several brothers, including the plaintiff, Luther C. French, and Dudley S. French. It does not appear that any person,

except Michaels and Francis B. French, ever saw the aforesaid deed, or had the slightest knowledge thereof, until about half an hour before French died, when it was found by William Welch, inclosed in an envelope with a letter, in a cigar-box, in the drawer of the table, in the house occupied as a residence by French. The following words were indorsed upon this envelope: "This deed to be placed in the recorder's office at Erie, Kansas, for record, and the accompanying letter to be mailed as per direction thereon." At the time this deed was found, French was speechless and unconscious, and remained in that condition until he died, about half an hour afterward. Welch immediately telegraphed to Dudley S. French, who resided at Clinton, Illinois, and French came to Kansas, arriving on August 4, 1879, at the place where Francis B. French died. Shortly afterward, Welch delivered to French the aforesaid deed. This is the first time that French ever saw the deed; and he never heard of it until after the death of Francis B. French. On August 6, 1879, Dudley S. French filed the deed for record in the office of the register of deeds of Neosho County. Dudley S. French then took possession of the land, and remained in the possession thereof until he sold the same to John Stone, the plaintiff in error. Dudley S. French was a brother-in-law to Stone, and for a time lived at his house. He was weak in body and in mind, and a part of the time could scarcely dress himself. On June 10, 1882, he sold and conveyed this land by warranty deed to Stone, for the expressed consideration of two thousand dollars, but for the real consideration of only eight hundred dollars. He was a single man at the time. The land was worth about three thousand dollars. Stone, at the time, did not know that there was any infirmity in the title of Dudley S. French; and for the purposes of this case, he must be considered as in fact a *bona fide* purchaser, whatever the law may be. The deed from Dudley S. French to Stone was recorded on June 16, 1882. At some time during the summer of 1882, Stone took possession of the land, and has remained in the possession thereof ever since. This action was commenced on October 16, 1884. All the heirs at law of Francis B. French, including the plaintiff below, Luther C. French, and Dudley S. French, were made parties to the action; so, also, were the defendant, John Stone, and S. Michaels and others. Dudley S. French died on January 7, 1885, after this action was commenced, but before the trial was had.

It is conceded by all parties that John Stone is entitled to one seventh of the land in controversy, — that amount being admitted to be the share inherited by Dudley S. French from Francis B. French; but Stone claims that he is entitled to all the land; and whether he is entitled to only one seventh thereof, or to all the land, is the only substantial question involved in this case. The principal questions presented by counsel to this court are as follows: 1. Was the deed from Francis B. French to Dudley S. French ever delivered so as to make it a valid deed? 2. If not, then is John Stone, for any reason, entitled to more than one seventh of the land in controversy?

There is no room for even a pretense that the deed was ever in fact delivered to Dudley S. French, or to any one else; and there is scarcely any room for even a pretense that it was ever in law delivered. The only grounds upon which it is claimed that it was ever delivered are the letter of Francis B. French to Dudley S. French, dated March 1, 1878, the indorsement on the envelope found in the cigar-box on August 2, 1879, and the words contained in the deed, to wit, "Signed, sealed, and delivered in the presence of S. Michaels."

Now, it may be conceded that these things constitute some evidence of a delivery, but when it is shown conclusively by the other evidence that there was no delivery, these things can have no force. Besides, the letter itself shows that there was no present intention on the part of Francis B. French of conveying the land or delivering a deed to Dudley S. French. And it also shows that Francis B. French contemplated that he might before his death sell the land to some other person. Francis B. French never had any intention of conveying the land immediately, but it was always his intention, unless he sold the land, to retain the title thereto in himself as long as he lived, and to let the property go to Dudley S. French only after his death. This does not constitute a delivery of a deed or a conveyance of the land. Of course there are cases where it is not necessary that there should be any actual manual delivery of the deed. A recording of the deed is sometimes considered as a delivery. So, also, is a delivery to a third person sometimes considered as a delivery to the grantee. And where a deed is executed by a father to an infant child, with the intention that the title shall immediately pass and vest in the child, and the father retains the custody of the deed as the natural guardian of the child, the title may pass. But

none of these cases is the present case; nor is the present case anything like them. Dudley S. French was not an infant, and although he was a man of weak mind, yet he was not *non compos mentis*. The deed was not delivered or recorded by Francis B. French, nor during his lifetime, and he never had any intention that the title should pass until after his death. The deed never was a deed in law, and Dudley S. French never had any right to it; nor had he any right to have it recorded; nor did it convey any title, interest, or estate to him. It was not merely voidable, but it was absolutely void. The court of appeals of New York uses the following language: "A rule of law, by which a voluntary deed executed by the grantor, afterward retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity": *Fisher v. Hall*, 41 N. Y. 421, 422; see also *Burton v. Boyd*, 7 Kan. 17, 31, et seq.; *Huey v. Huey*, 65 Mo. 689.

Taking this view of the case, John Stone obtained no title from Dudley S. French, for Dudley S. French had none whatever to convey. This is unlike a case where a deed is only voidable, and a *bona fide* purchaser obtains title from the holder of the same without any notice of its infirmity. In such a case he may obtain a good title; but where the deed is absolutely void he cannot. It seems to be admitted that if the deed were forged, no person could obtain any title under it, however innocent he might be; but a forged deed is no more void than this deed. Both in this respect are precisely alike; both are equally void, and neither the record of a forged deed nor the record of an absolutely void deed can be invoked to support or bolster up a disputed title; for the record is worth no more than the original deed itself. It is only instruments that have some validity, and that may in some manner affect real estate, that can be recorded legally. There is no statute authorizing the recording of a void instrument, and it is an error to suppose that the statutes can have the effect of making valid an absolutely void instrument by permitting the void instrument to be recorded. The instrument is still void, although recorded. The record can give it no

validity. As tending to support the view that a purchaser of real estate from a person holding under a void recorded deed, although in fact a *bona fide* purchaser, cannot obtain a good or valid title, or indeed any title, we refer to the following authorities: *Everts v. Agnes*, 6 Wis. 453; *Tisher v. Beckwith*, 30 Id. 55; 11 Am. Rep. 546; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1; *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517; *Smith v. South Royalton Bank*, 32 Vt. 341; 76 Am. Dec. 179; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Berry v. Anderson*, 22 Ind. 37, 40. The case of *Lewis v. Kirk*, 28 Kan. 497, 505, 42 Am. Rep. 173, has no reference to void deeds, or to the record of void deeds.

A deed not delivered at all is a very different thing from a deed actually delivered, even though the delivery of the same may have been procured through fraud; and a deed not delivered, but wrongfully in the hands of the apparent grantee, without fault or negligence on the part of the owner of the land, is unlike a deed not delivered, but which, through the fault or negligence of the owner, has been permitted to get into the hands of the apparent grantee. In the present case the deed was never delivered, and was not permitted to get into the hands of Dudley S. French, the apparent grantee, while Francis B. French was the owner of the land; but after Francis B. French died, and after the title to the land had passed from him to his heirs, the deed did get into the hands of Dudley S. French, the apparent grantee, but not through any fault or negligence on the part of the heirs, who were then the owners of the land.

Other points are raised in this case, but they are technical and unsubstantial, and require no comment. To reverse the judgment of the court below for any of them would be a violation of the spirit of the Civil Code, and especially of sections 140 and 304. We think no substantial error has been committed in this case; and it is unnecessary to prolong this opinion.

The judgment of the court below will be affirmed.

DELIVERY OF DEED. — A deed is never valid in the absence of its delivery by the grantor and its acceptance by the grantee. With respect to its acceptance there may be many cases in which it will be presumed without any direct evidence upon the subject, as where such acceptance is manifestly to the interest of the grantee: *Bullitt v. Taylor*, 69 Am. Dec. 412; *Stone v. King*, 84 Id. 557. It has been held that it is possible for a deed to be delivered and yet remain in the hands of the grantor. If a delivery can exist under such

circumstances, it can only be where the evidence shows that the grantor intended an absolute and irrevocable delivery: *Wall v. Wall*, 64 Id. 147. In the event of the execution and recording of a conveyance of a father to his minor child, the acceptance of the deed by the latter will be presumed and the delivery regarded as sufficient, though the father obtains possession of the deed after it is recorded, and thereafter retains such possession: *Tobin v. Bass*, 55 Am. Rep. 392. But the recording of a deed, where its delivery is not proved or presumed, does not entitle it to be regarded as a deed, or given any effect whatsoever: *King v. Gilson*, 83 Am. Dec. 269. The practice prevails, to a considerable extent, of signing and acknowledging conveyances which the grantors expect to operate from and after their deaths, but not before. Nothing, we think, can be clearer than that a deed must have some effect in the lifetime of the grantor, or else can have no effect whatsoever, unless, indeed, where it is so executed and attested as to entitle it to be treated as testamentary in its character. However this may be, if the deed, whether retained by the grantor or put by him in the possession of a third person, is by him so far kept within his control that he has the right to resume possession of it or not, then, certainly, it cannot be valid as a conveyance, though he may have intended that it should so operate in case that he did not repossess himself of it, or destroy it, previous to his death: *Baker v. Haskell*, 93 Am. Dec. 455, and note; *Jones v. Jones*, 16 Id. 35, and extended note, in which the cases on the subject are referred to.

UNDELIVERED DEED, NOT FULLY EXECUTED, stolen from grantor, passes no title, even to a *bona fide* holder for value: *Tisher v. Beckwith*, 11 Am. Rep. 546; *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1.

WHAT CONSTITUTES SUFFICIENT DELIVERY OF DEED: See *Wellborn v. Weaver*, 63 Am. Dec. 235; *Hibberd v. Smith*, 56 Am. Rep. 726; *Burke v. Adams*, 50 Id. 510; *Taft v. Taft*, 60 Id. 291; *Fain v. Smith*, 58 Id. 281, and note.

JOHNSON v. WILLIAMS.

[37 KANSAS, 179.]

QUITCLAIM DEED TO LAND CONVEYS ALL GRANTOR'S INTEREST and estate in such land, unless otherwise specified in the deed itself.

COVENANTS OF FORMER GRANTORS WHICH RUN WITH LAND PASS TO GRANTEE UNDER QUITCLAIM DEED. — Grantee in a quitclaim deed obtains the right to any interest that may at any time come to grantees of his former grantors by virtue of covenants that run with the land.

GRANTOR GIVING QUITCLAIM DEED may subsequently acquire and assert against his grantee adverse title to the same land.

BONA FIDE PURCHASER. — Grantee holding only a quitclaim deed from his immediate grantor is not a *bona fide* purchaser.

GRANTEE UNDER QUITCLAIM DEED TAKES WITH NOTICE OF DOUBTFUL TITLE, and is put upon inquiry as to such title; and he is presumed to have a knowledge of all outstanding equities and interests which he could have obtained with a reasonable degree of diligence.

EJECTMENT brought by Williams against Johnson to recover certain lands.

Bowen and Kirkpatrick, for the plaintiff in error.

Scott and Frith, for the defendant in error.

By Court, VALENTINE, J. This was an action in the nature of ejectment, brought by D. H. Williams against Samuel M. Johnson for the recovery of certain real estate in Elk County. The record clearly shows that Williams is the legal owner of the land in controversy, unless his title thereto has been divested by a certain tax deed, and other proceedings founded thereon, which will be hereafter mentioned. On September 17, 1881, the aforesaid tax deed was executed by the county clerk of Elk County to Anna Eby, and was recorded on September 20, 1881. On said day Anna Eby executed a quitclaim deed for the land to Lark Vinson, which deed was recorded on December 10, 1881. On September 26, 1881, Vinson commenced an action in the district court of Elk County against the said defendant, D. H. Williams, and others, to quiet his title to the property in controversy, and obtained service of summons by publication only. On December 8, 1881, a judgment was rendered in that action quieting Vinson's title as against all the defendants in that action. On December 10, 1881, Vinson executed a quitclaim deed for the property to Richard M. Roe, which deed was recorded on December 19, 1881. On July 22, 1882, said Roe, by his quitclaim deed, remised, released, and quitclaimed unto Samuel M. Johnson, the plaintiff in error, defendant below, all his right, title, and interest in and to the land, which deed was duly recorded on July 25, 1882. On October 12, 1882, Williams filed his motion in the district court of Elk County to open up said judgment under section 77 of the Civil Code; and such proceedings were had that on November 8, 1883, the motion was sustained, and Williams permitted to defend in the action. On March 7, 1884, a trial was had in the action, and judgment was rendered in favor of Williams, and against Vinson, decreeing Williams to be the owner in fee-simple of the land, and quieting his title as against Vinson and all persons claiming under him. This present action of ejectment was commenced on August 8, 1884, and was tried before the court without a jury, and judgment was rendered in favor of Williams, and against Johnson, for the recovery of the land, and for costs. Johnson brings the case to this court for review.

It is admitted that Johnson, in purchasing the property, paid value therefor, and at the time had no knowledge of the

claim of Williams; or in other words, it is admitted that Johnson was "a purchaser in good faith" of the property, provided a purchaser taking a quitclaim deed for the property can be "a purchaser in good faith." In this state, a quitclaim deed to land will convey to the grantee all the rights, interests, title, and estate of the grantor in and to the land, unless otherwise specified by the deed itself: Conveyance Act, sec. 2; *Utley v. Fee*, 33 Kan. 683, 691. Such deed will convey such of the covenants of former grantors as run with the land: *Scoffins v. Grandstaff*, 12 Id. 467. And the grantee in a quitclaim deed will be entitled to such further title or estate as may inure at any time to the grantees of such former grantors by virtue of such covenants as run with the land: See case last cited. But a quitclaim deed will not estop the maker thereof from afterward purchasing or acquiring an adverse title or interest, and holding it as against his grantee: *Simpson v. Greeley*, 8 Id. 586, 597, 598; *Bruce v. Luke*, 9 Id. 201, 207, et seq.; 12 Am. Rep. 491; *Scoffins v. Grandstaff*, 12 Kan. 469, 470; *Young v. Clippingier*, 14 Id. 148, 150; *Ott v. Sprague*, 27 Id. 624. And a person who holds only by virtue of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a bona fide purchaser: *Bayer v. Cockrill*, 3 Id. 283, 294; *Oliver v. Piatt*, 3 How. 333, 410; *May v. Leclaire*, 11 Wall. 217, 232; *Villa v. Rodriguez*, 12 Id. 323; *Dickerson v. Colgrove*, 100 U. S. 578, 584; *Baker v. Humphrey*, 101 Id. 494, 499; *Runyon v. Smith*, 18 Fed. Rep. 579; *United States v. Sliney*, 21 Id. 895; *Watson v. Phelps*, 40 Iowa, 482; *Smith v. Dunton*, 42 Id. 48; *Besore v. Dosh*, 43 Id. 211, 212; *Springer v. Bartle*, 46 Id. 688; *Postel v. Palmer*, 71 Id. 157; *Bragg v. Paulk*, 42 Me. 517; *Coe v. Persons Unknown*, 43 Id. 432; *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Id. 147; *Mann v. Best*, 62 Id. 491; *Rodgers v. Burchard*, 34 Tex. 441, 452; 7 Am. Rep. 283; *Harrison v. Boring*, 44 Tex. 255; *Thorn v. Newson*, 64 Id. 161; 53 Am. Rep. 747; *Richardson v. Levi*, 67 Tex. 359; *Smith's Heirs v. Branch Bank of Mobile*, 21 Ala. 125, 134; *Derrick v. Brown*, 66 Id. 162; *Everest v. Ferris*, 16 Minn. 26; *Marshall v. Roberts*, 18 Id. 405; 10 Am. Rep. 201; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 146; 9 Am. Dec. 736; *Smith v. Winston*, 2 How. (Miss.) 601; *Kerr v. Freeman*, 33 Miss. 292, 296; *Learned v. Corley*, 43 Id. 688; *Leland v. Isenbeck*, 1 Idaho, 469; *Baker v. Woodward*, 12 Or. 3, 10; *Richards v. Snyder*, 11 Id. 511; *Snowden v. Tyler*, 21 Neb. 199; *McAdow v. Black*, 6 Mont. 601; *Martin v. Morris*, 62 Wis. 418; *Laurens v. Anderson*, 1 S. W. Rep. 379 (Tex.);

Dodge v. Briggs, 27 Fed. Rep. 160; *Peaks v. Blethen*, 77 Me. 510.

It may be that, with reference to some equities or interests in real estate, the purchaser who holds only under a quitclaim deed may be deemed to be a *bona fide* purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret, and concealed, and not only unknown to the purchaser, but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible, also, that a purchaser taking a quitclaim deed may, under the registry laws, be considered a *bona fide* purchaser with reference to a prior unrecorded deed, with respect to which he has no notice, nor any reasonable means of obtaining notice: *Bradbury v. Davis*, 5 Col. 265; *Butterfield v. Smith*, 11 Ill. 485; *Brown v. Banner Coal and Coal Oil Co.*, 97 Id. 214; 37 Am. Rep. 105; *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316; *Graff v. Middleton*, 43 Cal. 341; *Pettingill v. Devin*, 35 Iowa, 344. But, *contra*, see *Thorn v. Newson*, 64 Tex. 161; 53 Am. Rep. 747, and note; *Pastel v. Palmer*, *supra*.

We would think that in all cases, however, where a purchaser takes a quitclaim deed, he must be presumed to take it with notice of all outstanding equities and interests of which he could, by the exercise of any reasonable diligence, obtain notice from an examination of all the records affecting the title to the property, and from all inquiries which he might make of persons in the possession of the property, or of persons paying taxes thereon, or of any person who might, from any record, or from any knowledge which the purchaser might have, seemingly have some interest in the property. In nearly all cases between individuals, where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received; hence, when a party takes a quitclaim deed, he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title. Also, as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim, and scarcely a shadow of claim to the lands for which the deeds are given; and the deeds may be executed for a merely nominal consideration,

and merely to enable speculators in doubtful titles to harass and annoy the real owners of the land; and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed. This kind of thing should not be encouraged. Speculators in doubtful titles are not so pre-eminently unselfish, altruistic, or philanthropic in their dealings with others as to be entitled to any very high degree of encouragement from any source. There are cases which are claimed to be adverse to the opinions herein expressed. They will be found cited in Martindale on Conveyancing, secs. 59, 285, and notes, and 12 Cent. L. J. 127.

Not wishing to decide anything further in this case than is necessary to be decided, our decision will be as follows: A person who holds real estate by virtue of a quitclaim deed only from his immediate grantor, whether he is a purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities, and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries.

The judgment of the court below will be affirmed.

WORDS "RELEASE, REMISE, AND FOREVER QUITCLAIM," used in a deed of land, are effectual to pass title to grantee: *Rowe v. Beckett*, 95 Am. Dec. 676. Quitclaim deed is as effectual to pass title as a deed of bargain and sale: *McConnell v. Reed*, 38 Id. 124, and note. Quitclaim deed conveys only interest of grantor at the time it was executed: *Towle v. Ewing*, 99 Id. 181; *Taylor v. Harrison*, 26 Am. Rep. 304; *Derrick v. Brown*, 66 Ala. 162; *Thorn v. Newson*, 55 Am. Rep. 747, and note; *Rodgers v. Burchard*, 7 Id. 283. Entry under quitclaim deed of tax collector gives color of title and possession of land covered by deed: *Wells v. Jackson etc. Co.*, 90 Id. 575, and note 592. After-acquired title does not pass: *Bruce v. Luke*, 12 Id. 491. To the rule that quitclaim deed conveys only the interest of grantor at time conveyance is made, there are two exceptions; one is founded upon the recording act, and the other is where sale has been made by sheriff under execution: *Allison v. Thomas*, *ante*, p. 89. Quitclaim deed, with the additional words, "in such manner as he [the grantor] may and to the extent that he has heretofore acquired title to," etc., will not pass an after-acquired title: *Torrence v. Shedd*, 112 Ill. 466. Quitclaim deed, given by one who is a devisee for life, and who also has a power to dispose of entire estate, conveys his life estate only: *Towle v. Ewing*, 99 Am. Dec. 179. Deed of release and quitclaim, describing interest conveyed by grantor as that held by him as heir of A, does not convey an independent title to grantor: *Ingalls v. Newhall*, 139 Mass. 268. Land bought by grantor, and held by him under land-office certificate, will pass to grantee under quitclaim deed, when it is afterwards patented to grantor: *Frost v. Meth etc.*, 56 Mich. 62. Quitclaim deed of mortgaged premises, made by the mortgagee before foreclosure of mortgage, and without assignment to grantee of mortgaged debt, passes no title: *Lunt v. Lunt*, 71 Me. 377. Recorded quitclaim deed takes precedence of prior unrecorded war-

ranty deed: *Cutler v. James*, 54 Am. Rep. 603; *Fox v. Hall*, 41 Id. 316; *Brown v. Banner etc. Co.*, 37 Id. 105. Prior unrecorded quitclaim deed takes precedence of subsequent quitclaim deed which is duly recorded: *Marshall v. Roberts*, 10 Id. 201. Effect of prior unrecorded deed: *Johnson v. Tool*, 25 Id. 164, note. Interest of grantee under recorded quitclaim deed is subordinate to that conveyed by a prior unrecorded mortgage: *Snow v. Lake's Adm'r*, 51 Id. 625; *contra*, *Allison v. Thomas*, *ante*, p. 89. Record of quitclaim deed of land as constructive notice: *Ely v. Wilcox*, 91 Am. Dec. 436, and note. Operative words of release in simple quitclaim deed are "remise, release, and quitclaim": *Touchard v. Crow*, 81 Id. 108. The words "all my right, title, and interest in and unto," in granting part of a deed, make it a quitclaim deed: *Cummings v. Dearborn*, 56 Vt. 441.

BENNETT v. KROTH.

[37 KANSAS, 285.]

COSTS IN CRIMINAL ACTIONS ARE UNKNOWN at common law, and are only given by statute.

COSTS ARE STATUTORY ALLOWANCE to a party to an action for his expenses incurred in such action, and have reference only to the parties and the amounts paid by them.

WITNESSES MAY BE COMPELLED BY STATE to attend court and give their evidence without compensation.

WITNESSES ON BEHALF OF DEFENDANT CHARGED WITH CRIME, whom he requests or compels to attend court, are entitled to recover of him for their services as such witnesses.

ACTION by Kroth for his services in attending court as a witness in behalf of defendants. Defendants demurred. The demurrer was overruled, and judgment entered for plaintiff.

Hayden and Hayden, for the plaintiffs in error.

W. S. Hoaglin and John T. Morton, for the defendant in error.

By Court, **HOLT, C.** The petition filed by the defendant in error, plaintiff below, is in the usual form for services rendered; it states that plaintiff was in attendance upon the district court for five days at defendants' request; that he was compelled to travel thirty-two miles in going to and returning from court. The defendants demurred to the petition, because it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and judgment rendered for plaintiff for the amount claimed in his petition. Nothing was stated therein concerning fees, though the claim was for the sum the fees would be for attendance at court and mileage, as provided by statute. Both parties agree

that there is only one question in this case, and that is, whether a defendant tried for a felony and acquitted is liable to his own witnesses. If he is, then this judgment should be affirmed; if not, it should be reversed.

Plaintiffs in error suggest that there are quite a number of other claims similar to this one, and as it is a question of some public importance, we give it more careful consideration than the sum involved may at first seem to justify. The plaintiffs in error, in their brief, say: "The constitution guarantees to every person accused of crime the right to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. By this compulsory process, the state in its sovereign capacity commands the witness to appear and testify, not merely for the sake of the plaintiff or defendant, but for the investigation and adjudication of right. The service which the witness thus renders is merely the discharge of a public duty which he owes to the state; and, unless some statutory provision is made for his compensation, he must render such service gratuitously."

They further say that costs and fees are regulated exclusively by statute, and are unknown at common law; and because there is no statute compelling a defendant to pay costs when he is acquitted, therefore the defendants are not liable in this action. This court has held "that costs are unknown at common law, and are only given by statutory direction": *State v. Campbell*, 19 Kan. 481. It is well enough, therefore, for us to understand what is meant by costs: they are the statutory allowance to a party to an action for his expenses in conducting such action; they have reference only to the parties, and the amounts paid or presumed to have been paid by the party seeking to recover such expenses. The basis of the claim in this cause is not founded upon any claim for costs in the action of the state of Kansas against these defendants; but the question is, whether the plaintiff, who was requested to appear in court by the defendants, as alleged in his petition, can recover of them for his services. Ordinarily, of course, at common law he could, for services rendered at their request.

We wish, however, to decide this question on the theory that the plaintiff was regularly subpoenaed to appear in court as a witness for the defendants, and not at their personal request, as might fairly be inferred from the petition. If the defendants' theory is correct, we have this singular construction of

the law: when a defendant personally requests a party to appear in court as a witness in his behalf, he will be liable to such witness for services rendered; but when he requests him to appear through the proper officers of the court, then the fact that the officers brought his witness into court would relieve him of such liability. We cannot believe there is any such distinction.

We agree with the defendants that the state, in the exercise of its sovereignty, may require certain services of its citizens without compensation; and this state does to this day bring its witnesses into court in certain causes where it is a party, without becoming liable to them in any event for witness fees. It is said that it is as much the duty and interest of the state to see to it that an innocent man charged with crime is acquitted as it is to convict and punish a criminal; and therefore it is contended that in cases like the one we are now considering, because the state is relieved of the burden of paying costs, the defendant ought not to pay his own witnesses. An argument might be fairly drawn from the above premises that it would be proper for the state to pay the witness of a defendant who has been falsely charged with, and unjustly prosecuted for, an alleged crime. Such an argument would be properly addressed to the legislature, but it has no place in the courts.

Our statute relieves the state in this case of all liability in express terms. It would not be liable, probably, if there were no such statutory provision; but it is insisted, because the defendants cannot recover their costs of the state, the witnesses for the defendants ought not to recover of them; or, in other words, if for any reason B could not recover of A for damages A had inflicted upon him, therefore B would not be liable to C, though B had called upon him for aid against A. This is neither good law nor logic. While the state is equally interested in the acquittal of the innocent and in the conviction of the guilty, the long-established practice in the courts does not carry out the theory contended for. The state employs and pays an attorney to select the witnesses for the state, and to prosecute the action, while the defendant employs his own counsel and calls the witnesses in his own behalf. The defendant has a personal interest in his own behalf, differing from that of other citizens of the state. He is given by the law an ample opportunity to protect himself, *and it is his province, prompted by self-interest, to do so.* So

he calls upon those whom he believes may help him; they do so at his request; he should pay them for their services.

The provision of our constitution guaranteeing compulsory process to every one charged with crime does not extend to the payment of the fees of the witnesses for the defendant, nor does it relieve him of his liability to them: *Carpenter v. People*, 3 Gilm. 147.

The state by this provision gives every facility for a fair and impartial trial to all citizens alike, high and low, rich and poor; and, in order to give a defendant the full benefit thereof, provides by a statute in harmony with it that inability to pay his fees in advance shall not impair his means of defense. This clause of our constitution has no more application to paying the defendant's witnesses than in selecting them. After the defendant has filed his precipe for witnesses, the state guarantees to the defendant the use of all its powers in bringing them into court; this is its scope and effect, and nothing more.

But, in our view of the case, we need not decide what may be the duties of the citizen to the state, nor of the state to one of its citizens who is called as a witness into its courts, nor even to one who has been charged with crime, and tried, and acquitted. It is the question of liability of one party to another,—these defendants to their witness whom they called to their aid. It does not change the relations, duties, or obligations of these parties, so far as the liability of these defendants to plaintiff for compensation is concerned, because he upon whom they called, in order to render the aid desired, came into court as a witness in their behalf; nor does it affect that liability because the state, in defendants' interest, could have made that call imperative. We believe that the rule, that he who requires and receives services from another should pay him therefor, applies to this action, and should govern our decision.

We presume it will be conceded that a witness would be liable to the defendant for any damages occasioned by his failure to attend court when regularly subpœnaed. Ordinarily it would be fair to infer that, because of this contingent liability of the witness to the defendant if he failed to perform certain services, there ought, on the other hand, to be some compensation if he did perform them.

We have carefully examined all the authorities cited in the briefs of both parties. Many of them relate to costs or fees

in civil actions, others to the taxation of costs in actions pending, while others were decided with reference to the statutes of the state where the decisions were rendered. The only authority we find in point is *State v. Whithed*, 3 Murph. 223. The point decided was submitted in the original case, not in an action by the witness against the defendant. It was this: where a defendant had been tried and acquitted, would he be liable for costs, and if so, what costs? The court, in deciding the case, said: —

“The defendant is bound to pay his own costs, for he incurs them by calling on those whose services he thinks he needs, and he must pay them for labor done at his request.”

In that state, as in this, there was no statute concerning the liability of the defendant to his own witnesses, when he had been charged with a crime and acquitted.

We believe the judgment of the court below should be affirmed.

WITNESS FEES. — Witness subpoenaed and attending court in good faith can recover compensation for such attendance, and reasonable traveling expenses: *Gunnison v. Gunnison*, 77 Am. Dec. 764. For an extended discussion on the subject of compensation of witnesses, see note to *Ella v. Knox*, 88 Id. 182. Witness without the state, obeying subpoena in a criminal action, is entitled to his *per diem* and mileage for whole distance traveled by him: *Westfall v. Madison Co.*, 62 Iowa, 427. Defendant, under indictment in one case, made a witness for the United States in another case, is entitled to witness fees: *In re Addis*, 28 Fed. Rep. 794. Officers of defendant corporation, representing such corporation, and giving testimony in a suit for an accounting by corporation, are not allowed fees as witnesses: *Am. Diamond etc. Co. v. Sullivan etc. Co.*, 23 Blatchf. 144. Effect of pardon on judgment for costs: *State v. Mooney*, 21 Am. Rep. 487; *Estep v. Lacy*, 14 Id. 498.

BURKE v. JOHNSON.

[37 KANSAS, 337.]

JUDGMENT IS LIEN UPON ACTUAL, not the apparent, interest of the defendant.

ATTACHMENT LIEN is not greater than that created by a judgment.

PLAINTIFF LEVYING ATTACHMENT IS NOT PURCHASER, and is therefore affected by prior transfers of which he has no notice.

CONTRACT OF PURCHASE TRANSFERS TO GRANTEE the equitable right to the property, subject to the grantor's lien for the remaining unpaid purchase-money. Under contract of purchase, grantee can compel grantor to make conveyance of legal title when the purchase-money is paid.

INTEREST OF VENDOR WHO HAS MADE CONTRACT OF SALE and received part of the purchase-money is not subject to attachment or execution,

though he retains the legal title. The vendee may, therefore, safely pay him the balance of the purchase-money, though the property has, in the mean time, been attached under a writ against the vendor.

ATTACHMENT UNDER WRIT AGAINST VENDOR of property in possession of vendee, under contract of purchase, is neither a lien on the property nor on the unpaid purchase-money.

ACTION by Burke against Armstrong, in which a farm and a lot of stock and implements thereon were attached on April 9, 1884, as the property of Armstrong. I. B. Johnson interpleaded, claiming the property. He had purchased it on April 8, 1884, at which time he received a written contract of sale signed by Armstrong by his agent, Coons, and which recited the payment of \$40 in money, and \$1,760 in a note in favor of Armstrong, due one day after date, as in full for the farm and other property. The receipt stated that Johnson might take possession at once, and that a deed would be given to him as soon as it could be obtained from Armstrong. Johnson took possession on April 10th. On the day previous he had paid his note of \$1,760, in ignorance of any attachment or claim by plaintiff, and received a conveyance from Armstrong and wife of all the property. These facts were found by the court, which adjudged that Johnson was entitled to the property. Motion for new trial was overruled.

I. O. Pickering, O. A. Bassett, and G. C. Clemens, for the plaintiff in error.

A. Smith Devenney, John T. Little, and Samuel T. Seaton, for the defendant in error.

By Court, CLOGSTON, C. But one question is presented, that is, Are the conclusions of law sustained by the findings of fact? This question must be determined by an examination of the title to the property at the time the attachment was levied; and if Armstrong at that time had a leviable interest in the property, then the judgment should be reversed. The facts as found by the court show that the legal title to the property remained in Armstrong, subject to the interest and rights of Johnson under his contract of purchase. This contract transferred to Johnson the equitable right to the property, subject alone to Armstrong's lien for the remaining unpaid purchase-money. This lien amounted to a security only, and when this purchase-money was paid he could be compelled to convey the legal title to the equitable owner of the property: *Jones v. Lap-*

ham, 15 Kan. 544; *Stevens v. Chadwick*, 10 Id. 407; 15 Am. Rep. 348; *Orrick v. Durham*, 79 Mo. 177; *Woodward v. Dean*, 46 Iowa, 499. This doctrine has been fully settled by this court. In *Holden v. Garrett*, 23 Kan. 98, this question is discussed. In that case the question was, Is a judgment a lien on property, where the legal title is held by the judgment debtor and the equitable title or interest is held by the mortgagee, so as to defeat the mortgagee's interest in the property? It was held in that case that the judgment was not a lien upon the bare, naked legal title, the equitable title being held by another. The statute provides that judgments shall be liens upon the real estate of a debtor within the county. It was said: "This evidently contemplates actual and not apparent ownership. The judgment is a lien upon that which is his, and not that which simply appeared to be his. How often the legal title is placed in one party when the equitable title, the real ownership, is in others! Now, if the judgment is a lien upon all that appears, it will cut off all the undisclosed equitable rights and interests. To extend the lien to that which is not, but appears of record to be the defendant's, is to do violence to the language. 'Real estate of the debtor,' plainly means that which is in fact of or belonging to the debtor": See *English v. Law*, 27 Kan. 242; *Ransom v. Sargent*, 22 Id. 516; *Harrison v. Andrews*, 18 Id. 541; *Northwestern Forwarding Co. v. Mahaffey*, 36 Id. 152.

In this case, the attachment binds the property of the debtor from and after the levy. The writ directs the officer to attach "the lands, tenements, goods, and chattels, stock, rights, and credits, moneys and effects of defendant in his county, not exempt by law"; and when so attached, a lien is created. Now, is this lien, under this order of attachment, greater than that created by a judgment? Surely not. A judgment is a lien upon all the property of the debtor, subject to the payment of his debts, and so is the attachment a lien upon the property of the debtor for the same purpose.

Plaintiff insists, however, that at the time of the levy of the attachment he had no notice, actual or constructive, of the purchase by Johnson of the property. We think no notice was necessary. The plaintiff in error lost nothing by want of such notice. He had parted with nothing; was not a purchaser in good faith, relying upon the constructive notice that persons without actual notice may rely upon; he was trying to enforce a claim, and, with notice or without, it left him in the same

condition. If he had been a purchaser in good faith, relying upon a legal title to the property, he would be protected.

Plaintiff again insists that his attachment at least bound the property and the defendant in error to the extent of the unpaid residue of the purchase-money, and that because Johnson, the defendant, paid the remaining purchase-money after the levy of the attachment, and after he had constructive knowledge of such levy, the plaintiff is entitled to a lien and judgment against the property to the extent of that unpaid purchase-money at the time of the levy. The court found that at the time of the payment of this purchase-money the defendant had no actual knowledge of the levy of the attachment; that he paid the money in good faith upon his contract, and accepted the title. Under such circumstances, the attachment could not bind the purchase-money; the land was not subject to attachment as the property of Armstrong, and consequently did not impart such constructive notice as would bind Johnson in the payment of this money: *French v. Debow*, 38 Mich. 708. If he had actual notice of the levy of the attachment upon the property, and of Armstrong's fraud, and with this knowledge paid the purchase-money, he would not be protected: See *Bush v. Collins*, 35 Kan. 535; *McDonald v. Gaunt*, 30 Id. 693; *Gollober v. Martin*, 33 Id. 252.

Counsel ask what remedy they are to pursue in case the attachment will not bind the property or the purchase-money, and the money cannot be reached by garnishment. In answer we can only say that all we have to deal with is the facts here presented. What the remedy would be under a given statement of facts will not be determined in advance. All we do say and all we are called upon to say in this matter is, that the attachment created no lien upon the property, and could not operate to restrain and hold the unpaid purchase-money in the hands of the defendant. Good faith on the part of Johnson in the completion of the contract is fully shown by the findings of the court. Counsel, however, insist that the conclusions drawn from these findings are not correct; that the fact of the hurried manner of the purchase, the manner of its sale in bulk, including the farm and personal property, the haste of the transaction, and the consideration paid, were sufficient to place Johnson upon his guard, and give notice of Armstrong's fraudulent intent. If these things are badges of fraud, and of such a character as to set aside this transaction, we think it would *unsettle the real estate transactions, or many*

of them, in Kansas. This property was regularly left in the hands of a real estate agent for sale; had remained in his hands for some days; he had offered it for sale; it had become known in the neighborhood; Johnson's attention was called to it by a neighbor; he went and found the agent and owner, visited the land, examined the records to see that the title was good, made an offer for the premises, including the stock and farming implements thereon, and this offer was accepted, and the contract drawn on the same day; part of the consideration was paid, and the transaction completed on the next day. We see no evidence of fraud in this. Apparent good faith characterized every transaction connected with it, so far as the defendant was concerned. The evidence fully shows this, and, further, that the property had been purchased by Armstrong from the plaintiff in bulk, and purchased as an entire transaction, and by Armstrong sold in the same way. And now, because of the fraudulent transaction on the part of Armstrong in the purchase of this property from the plaintiff, and perhaps the sale of it for that reason to Johnson, we are asked to set aside the sale, notwithstanding the fact that good faith is shown on the part of the defendant, and that there are no circumstances connected with the transaction calculated to excite the suspicions of a prudent man, or warn him of the fraudulent intent connected therewith.

It is recommended that the judgment of the court below be affirmed.

EQUITABLE TITLE TO REAL ESTATE PASSES FROM DATE OF CONTRACT OF SALE: *Brewer v. Herbert*, 96 Am. Dec. 582, and note. As to when such contract is binding, see *Id.* In equity, vendee of land under contract of sale is considered a trustee of vendor for payment of purchase-money: *Walton v. Hargroves*, 97 Id. 431; *Brewer v. Herbert*, 96 Id. 583. Vendor is a trustee for purchaser: *Sweepson v. Rouse*, 6 Am. Rep. 735. Vendor of land has lien in equity for unpaid purchase-money: *Gee v. McMillan*, 58 Id. 315. Requisites for creation of vendor's lien: *Harvey v. Kelly*, 93 Am. Dec. 267. Against whom lien of vendor of real estate for unpaid purchase-money exists: *Ellis v. Temple*, 94 Id. 200, and note. Vendor's lien will prevail as against vendee, his assigns with notice, and as against those having an equitable title only: *Walton v. Hargroves*, 97 Id. 429. Vendor's lien exists in Massachusetts only when expressly so stated: *Ahrend v. Odiorne*, 19 Am. Rep. 449. Whether lien for purchase-money of land revives where security taken proves worthless: *Madden v. Barnes*, 30 Id. 703; *Fouch v. Wilson*, 28 Id. 651; *Kendrick v. Eggleston*, 41 Id. 90. Action for enforcement of vendor's lien for purchase-money of land cannot be enforced after statutes of limitation have run against note given for payment of such money: *Tate v. Hawkins*, 50 Id. 185. Vendor's lien may be enforced in favor of one who is not grantor of land: *Russell v. Watt*, 93 Am. Dec. 270. Vendor's lien passes with notes

given for purchase-money of land to his assigns, who may, in equity, subject the land to the payment of such notes: *Robinson v. Harbour*, 97 Id. 502, and note; *Perry v. Roberts*, 95 Id. 689; *Sloan v. Campbell*, 36 Am. Rep. 493; *Stevens v. Chadwick*, 15 Id. 348. *Contra: Simpson v. Montgomery*, 99 Am. Dec. 228; *Hecht v. Spears*, 11 Am. Rep. 784; *Massey v. Gorton*, 90 Am. Dec. 287, and note 300. Distinction between lien of vendor after conveyance which is absolute, and where contract of sale is unexecuted: *Walton v. Hargroves*, 97 Id. 429, note 433. Existence, priority, and enforcement of vendor's lien for purchase-money of land: *Walton v. Hargroves*, 97 Id. 432; *Fain v. Inman*, 19 Am. Rep. 577. Express reservation of vendor's lien in deed amounts to an equitable mortgage: *Harvey v. Kelly*, 93 Am. Dec. 267. Rights of vendee of land who has paid for land, and entered into possession under parol purchase, are paramount to the liens of subsequent judgment creditors of vendor: *Snyder v. Martin*, 41 Am. Rep. 670. Equity will protect equitable rights of third persons existing at time judgment lien attaches: Id.; *Freeman on Judgments*, secs. 356, 357. Rights of attaching creditors of vendor are not affected by unrecorded deed of which they had no notice: *Carter v. Champion*, 21 Am. Dec. 695, and note. As to lien of judgment against vendor of land when vendee is in possession, see *Filley v. Duncan*, 93 Id. 337. Such lien attaches only to vendor's actual interest in land: Id. Payment of purchase-money by vendee after judgment against vendor: Id., and extended note 354.

CUNNINGHAM v. JONES.

[87 KANSAS, 477.]

TAX DEED MADE TO ATTORNEY AT LAW IS VOID, if the owner of the land was the client of such attorney at the time.

ATTORNEY AT LAW IS FORBIDDEN to purchase an interest in the thing in controversy adverse to his client.

PURCHASE BY ATTORNEY is not voidable merely, but void absolutely when it is of an interest in property adverse to a client for whom he is then acting.

EJECTMENT by Cunningham and McCarty, attorneys at law, claiming under a tax deed of the premises in controversy. Judgment for defendant.

Cunningham and McCarty, in propria personæ, for the plaintiffs in error.

A. M. Mackey and Madden Brothers, for the defendant in error.

By Court, HORTON, C. J. This was an action in ejectment, brought by the plaintiffs; trial by the court without a jury. A general finding for defendant was entered, and judgment rendered thereon. Plaintiffs excepted, and bring the case here. The facts are these: On May 3, 1877, one Charles

Ahrendt was the owner of the land in controversy. On that day he conveyed to Caroline Schutt, who took possession, and placed her deed on record. On June 21, 1877, J. G. Farlin, a creditor of Ahrendt, attached the land as his property. Judgment was rendered against Ahrendt, and Farlin purchased the land at sheriff's sale. H. S. Sook obtained title to the land by virtue of a deed from Caroline Schutt. Subsequently Farlin brought his action in ejectment against Sook, claiming that the conveyance from Ahrendt to Caroline Schutt, of May 3, 1877, was void as against his creditors. In that action it was held that H. S. Sook's title was perfect, and that the attachment proceedings of Farlin against Ahrendt did not avoid or affect his title: *Farlin v. Sook*, 30 Kan. 401; 46 Am. Rep. 100. The action of ejectment of *Farlin v. Sook*, *supra*, was brought August 15, 1880, and judgment was rendered December 23, 1882. During all the litigation between Farlin and Sook, the plaintiffs in this action were practicing attorneys at law, and were also the attorneys of Farlin. On September 2, 1879, while Farlin and Sook claimed to own the land in controversy, it was sold for delinquent taxes, and bought in by the county. On May 23, 1881, during the pendency of the litigation between Farlin and Sook, and while the plaintiffs were the attorneys of Farlin in that litigation, tax certificates of the land in controversy were assigned to W. E. Cunningham, one of the plaintiffs, who subsequently assigned an undivided one half thereof to W. T. McCarty, the other plaintiff. On these certificates a tax deed was issued September 13, 1882. The plaintiffs derive their alleged title from the tax deed.

The learned trial court rendered a judgment in favor of the defendant, upon the theory that plaintiff's tax deed was void because they were the attorneys for Farlin during all the time he was seeking to obtain title to and possession of the land embraced in the tax certificates and tax deed. In this view we fully concur. The purchase by an attorney of an interest in the thing in controversy, in opposition to the title of his client during litigation concerning the same, is forbidden, because it places him under temptation to be unfaithful to his trust: *Weeks on Attorneys*, secs. 274-277; *Wright's Ex'r v. Walker*, 30 Ark. 44; *Wade v. Pettibone*, 11 Ohio, 59; 37 Am. Dec. 408; *Zeigler v. Hughes*, 55 Ill. 288; *West v. Raymond*, 21 Ind. 305; *Simpson v. Lamb*, 7 El. & B. 90.

Plaintiffs concede this general doctrine, but contend that

their purchase under the tax proceedings is not absolutely void, but voidable only at the election of their client; that as their client is not complaining of their conduct, no one else ought to be heard to object. It is undoubtedly true that the purchase of the plaintiffs might have inured to the benefit of their client if he had made a claim therefor; but does his failure to demand the benefits of their purchase condone the offense, and render their title so acquired valid? We think not. An attorney, while acting for his client, is bound to the most scrupulous good faith. While the relation of an attorney and client continues, the courts will carefully and zealously scrutinize the dealings between them, and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client: *Haverty v. Haverty*, 35 Kan. 438.

After the purchase by the plaintiffs of their title under the tax proceedings, their interest was antagonistic to that of their client. Therefore the purchase by them was such, we think, "as might have betrayed their judgment, and endangered their professional fidelity." It is contrary to the policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position as adviser of his client concerning a pending litigation threatening the title to his property, and that of purchaser of such property, in opposition to the title of his client. Some of the courts have gone so far as to hold that where an attorney purchases from his client the subject of litigation, he must, before doing so, divest himself of the character of attorney, so that his former client may deal with him as a stranger: *Rogers v. Marshall*, 3 McCr. 76-95. Public policy seems to demand that there should be no temptation on the part of any one occupying the important relation of an attorney to make private gain out of the subject-matter of his professional employment, and therefore we think that the purchase by plaintiffs of the premises in dispute pending litigation was as to them wholly void.

The judgment of the district court will therefore be affirmed.

ATTORNEY MUST EXERCISE UTMOST GOOD FAITH TOWARD HIS CLIENT: *Kisling v. Shaw*, 91 Am. Dec. 652, and note; *Henry v. Raiman*, 64 Id. 703, and note. Attorney cannot buy an outstanding title to land against the interests of his client; such a purchase, whether made during or after termi-

nation of his employment, will inure to benefit of his client, or to such client's assigns: *Id.*; *Merryman v. Euler*, 43 Am. Rep. 564. Purchase by an attorney of land of his client, under an execution sale, will pass to the interests of his client: *Taylor v. Young*, 56 Mich. 285. If client wishes to take advantage of such a purchase, he must do so within a reasonable time: *Ward v. Brown*, 87 Mo. 468. Such purchase is good, if made in good faith, and is not against the interest of client: *Hyams v. Herndon*, 36 La. Ann. 879. Whether purchase by an attorney from his client voidable, see *Laclede Bank v. Keeler*, 109 Ill. 385; *Wharton v. Hammond*, 20 Fla. 934; *Lane v. Black*, 21 W. Va. 617. Bargain between attorney and client, which is an advantage to attorney, must be shown by him to be fair and equitable, free from misrepresentation or concealment, and attorney must show that his client was fully cognizant of his interests and of the effect of such bargain: *Kistling v. Shaw*, 91 Am. Dec. 646.

GIFT FROM CLIENT TO ATTORNEY. — Burden of proof on latter to show that there was no undue influence: *Whipple v. Barton*, 63 N. H. 613.

CONTRACTS BETWEEN ATTORNEY AND CLIENT COURTS WILL SCRUTINIZE: *De Louis v. Meek*, 50 Am. Dec. 491; *Miles v. Irwin*, 16 Id. 623; *Lecatt v. Sallee*, 29 Id. 249; *Dickenson v. Bradford*, 31 Am. Rep. 23; *Gruby v. Smith*, 13 Ill. App. 43. Supervision of courts over professional conduct of members of the bar: *Thallheimer v. Brinckerhoff*, 15 Am. Dec. 309, note 321.

VENABLE v. DUTCH.

[87 KANSAS, 515.]

COUNTERCLAIM IS DEMAND OF SOMETHING WHICH OF RIGHT BELONGS TO DEFENDANT, in opposition to the right of the plaintiff. It may also be defined as a claim which, if established, will defeat or qualify a judgment to which plaintiff would otherwise be entitled.

COUNTERCLAIM IN EJECTMENT. — An answer by defendant in ejectment setting up a tax title, and also a judgment in his favor against plaintiff quieting his title, is a counterclaim.

BURDEN OF PROVING FACTS STATED IN HIS COUNTERCLAIM rests upon the defendant.

JUDGMENT QUIETING TITLE, FOUNDED ON SERVICE OF SUMMONS by publication, will be respected and enforced in this state, as a complete divestiture of the title of the judgment defendant.

EJECTMENT by Venable against Dutch. Judgment for defendant.

A. J. Utley, for plaintiff in error.

S. S. Kirkpatrick, for defendant in error.

By Court, **HOLT, C.** This action was tried in the Wilson district court, at the May term, 1885. Plaintiff in error, plaintiff below, filed a petition for ejectment in the ordinary form. The defendant answered by a general denial, and also *claimed title* under a tax deed. The first trial was had, and

a second trial was granted under the statute. At the time of the second trial, plaintiff moved to strike out that part of defendant's answer setting up a title in himself by a tax deed, which motion was overruled by the court. Plaintiff then demurred to that portion of defendant's answer, which was overruled; whereupon he asked leave to dismiss his action without prejudice to a future action, which was allowed, but the court permitted the defendant to retain his answer for trial. Plaintiff then filed a general denial in reply, when the defendant asked leave to amend his answer by alleging that he had quieted his title to the land in question, by a judgment duly obtained by publication in the district court against the plaintiff. To this new cause of action plaintiff demurred, which demurrer was by the court overruled. A jury being waived, the issue was tried by the court, which rendered judgment for the defendant. This judgment plaintiff brings here for review.

Plaintiff assigns for error, first, that the second portion of defendant's answer should have been stricken out, for the reason that everything which might have been proven under it might have been proven under the general denial. Under that portion of the answer which plaintiff calls a cross-bill, the defendant asks for affirmative relief. Our statute provides that a defendant may set up in his answer, in addition to a general denial, any new matter setting forth a defense, a counterclaim, set-off, or right of relief concerning the subject of the action. But the plaintiff says that when he dismissed his cause of action, that the defendant's cause of action should have followed it, because the second part of defendant's claim was not a counterclaim, and cites section 398 of the Civil Code to show that the defendant has a right to proceed to the trial of his cause only when he has filed a set-off or counterclaim, after the plaintiff has dismissed his cause of action. Plaintiff contends that the second portion of defendant's answer is not, under our statutes, a counterclaim. The ordinary meaning of counterclaim is a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff. It is also defined as a claim which, if established, will defeat or in some way qualify a judgment to which plaintiff is otherwise entitled; it is the claim of a defendant to recover from a plaintiff by setting up and establishing any cross-demand which may exist in his favor as against plaintiff. But the plaintiff, in an argument ingenious rather than sound,

claims that there is a limited meaning of the word "counterclaim" given by our statute. By section 95 of the Civil Code, a counterclaim must be one existing in favor of a defendant and against a plaintiff, arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action.

The subject of plaintiff's action is his title to the land, and the adverse possession of defendant. The defendant claims that he is in possession lawfully, as the owner thereof, by virtue of a judgment quieting his title against plaintiff. We think that the claim in the answer is connected with the subject of plaintiff's action: *Jarvis v. Peck*, 19 Wis. 74; *Eastman v. Linn*, 20 Minn. 433.

In actions similar to the one we are now considering, where a plaintiff brought an action against a defendant in ejectment, and claimed to be the owner in fee-simple, and that defendant wrongfully kept him out of possession, and such defendant alleged ownership in himself, and stated that the plaintiff made some claim to the land, and asked that his title be quieted against him, this court has repeatedly denominated such answer a counterclaim: *Allen v. Douglass*, 29 Kan. 412; *Sale v. Bugher*, 24 Id. 432.

After plaintiff dismissed his cause of action, the defendant, under his answer seeking to quiet his title, is virtually plaintiff in all things save in name; the facts alleged in his answer must be sufficient to constitute a cause of action, and the relief to which he is entitled must be properly demanded; the burden of proof is upon him, and he must establish his cause of action by a preponderance of testimony before he is entitled to a judgment in his favor; being in the place of a plaintiff, and subject to his burdens, he also possesses his rights, and therefore it is within the discretion of the court to allow him to amend his pleading by adding another count. In this case, the court properly allowed such an amendment: *Allen v. Douglass*, *Sale v. Bugher*, *supra*; *Pomeroy's Remedies*, sec. 738.

By far the gravest question arising in this case is, whether a judgment in favor of one in possession of real property, obtained upon service by publication only, is sufficient to divest a defendant in such action of his interest therein. If we consult our statute alone, we find ample authority for such procedure. Section 595 of the Civil Code provides that an action may be brought by any person in possession of real property against any person who claims an interest or estate therein

adverse to him, for the purpose of determining such adverse estate or interest; and when the person who claims such adverse interest resides out of the state, and the relief prayed for consists wholly or partly in excluding him from any interest therein, such determination may be had after a service by publication alone: Civil Code, sec. 72. A sovereign state ought to have control over the real property within its limits, and its courts have the right to decide all questions relating to the titles to the same. By section 400 of the code it is provided that when a judgment is rendered for a conveyance, release, or acquittance, and the party against whom the judgment is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect as though the defendant had complied with the judgment of the court. Generally, equity jurisdiction is exercised *in personam*, and upon that theory some of the states have provided by statute that if the defendant is not found within the state, or refuses to make or cancel a deed to land within the jurisdiction of the court, it can be done in his behalf by a trustee appointed by the court for that purpose. The last part of section 400 provides that the sheriff may perform such duties as such trustee, but the instrument so executed by him under the judgment of the court stands on no higher plane than a simple judgment, and is no more available as a conveyance, release, or acquittance than such judgment. The appointment by the court of a trustee to execute or cancel a deed for defendant, when he has not been brought within the jurisdiction of the court, differs only in form from a judgment that is intended to accomplish the same object of itself. One is done directly, the other indirectly. Our statute attempts to do away with such mere formal distinctions.

Ordinarily it would be within the power of the state to substitute notice by publication or otherwise, for personal service against non-residents. It will be noticed that it is provided in section 72 of the Civil Code for a notice by publication, when the relief sought consists in excluding defendant from any interest in the land then in controversy. The notice does not specify that the defendant shall perform any act, execute any conveyance, acquittance, or release; it simply gives notice that a judgment will be rendered which shall exclude him from any interest in the land.

Service by publication, in conformity to our statutes, has been held sufficient by this court, and judgment and sales

thereon have now become a settled rule of property in this state: *Gillespie v. Thomas*, 23 Kan. 138; *Rowe v. Palmer*, 29 Id. 337. In *Hart v. Samson*, 110 U. S. 151, Mr. Justice Gray, speaking for the court, says: "The courts of the state might perhaps feel bound to give effect to the service directed by its statutes."

In this action we not only have the direction of the statutes, but also long-acquiesced-in decisions, which we would be compelled to disregard if we should hold the notice of publication insufficient in the former action of Dutch to quiet his title against Venable. In this action, plaintiff in error came into a court of this state to seek relief, and he ought to be governed and his claims to the land decided by the established rules of property of the court whose aid he invoked; he asks that we overthrow the long-established line of decisions, and hold our statutes void, in order to render a judgment in his favor. We are unwilling to so decide.

We recommend that the judgment of the court below be affirmed.

NATURE, DEFINITION, AND EXTENT OF COUNTERCLAIM: *Woodruff v. Garner*, 89 Am. Dec. 477, and extended note. Discontinuance of action after answer of counterclaim: *McLeod v. Bertschy*, 14 Am. Rep. 755. Burden of proof as to new matter set up by defendant in answer to a bill in chancery: *Cooper v. Tyler*, 95 Am. Dec. 442.

CONSTRUCTIVE NOTICE by publication where defendant is non-resident: *Harris v. Pullman*, 25 Am. Rep. 416. Service by publication, requisites of: *McGahan v. Carr*, 71 Am. Dec. 421, and note 427. Jurisdiction of defendant is obtained by service of process on such defendant or on his property within the jurisdiction of the court: *Sturgis v. Fay*, 79 Id. 440. Judgments are conclusive between the same parties where the same issues are involved: *Slocum v. De Lisardi*, 99 Id. 740; *Frisby v. Parkhurst*, 96 Id. 503; *Wright v. Dunning*, 92 Id. 257; *Joyce v. McAvoy*, 89 Id. 172, and note; *Benz v. Hines*, 89 Id. 598, note; *Heath v. Frackleton*, 91 Id. 405, note 407; *Footman v. Stetson*, 52 Am. Rep. 639; *Caperton v. Schmidt*, 85 Am. Dec. 187, and note.

JUDGMENT QUIETING TITLE. — This, so far as we have observed, is the first decision in a state court, since *Hart v. Samson*, 110 U. S. 151, discussing the questions apparently involved in the latter case. In that case, a record was offered in evidence against Hart from which it appeared that a state court had adjudged that he had no title to the land in question. The proceedings on which the record was based were in equity, and the decree declared that "several deeds, in the plaintiffs' petition mentioned, be and the same are hereby annulled and canceled, and for naught held, and the cloud thereby removed." The service of summons had, however, been made by publication, as against the defendant, Hart, he being a non-resident of the state. The decree, so far as it purported to affect Hart's title, was adjudged to be a nullity, because the court had no jurisdiction over him while he was a non-resident of the state. The court said: "Generally, if not uni-

versally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon a title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff. It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not within the jurisdiction, or refuses to make or to cancel a deed, this should be done on his behalf by a trustee appointed by the court for that purpose. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or canceled by or on behalf of a party. It has no inherent power, by mere force of its decree, to annul a deed, or to establish a title. In the judgment in question, no trustee to act in behalf of the defendant was appointed by the court, nor have we been referred to any statute authorizing such an appointment to be made. The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title. Such a decree, being *in personam* merely, can only be supported against a person who is not a citizen or resident of the state in which it was rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the state might, perhaps, feel bound to give effect to the service made as directed by its statutes; but no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other state; and it is of no greater force, as against a citizen of another state, in a court of the United States, though held within the state in which the judgment was rendered."

This language of the supreme court of the United States goes very far towards denying to any state the power to enact any statute which will enable one of its citizens to compel a non-resident to litigate an adverse claim of title held by him. This result is very unfortunate, for it seems that every state ought to be able to exercise such jurisdiction over all real property within its territory as will enable its courts to determine all questions relating to the title thereto. The mere non-residence of the claimant ought not to enable him to carry with him the jurisdiction over the land itself. This is, practically, the effect of the present state of the law as expounded by the national courts. It is true that in the principal case the court acted upon the suggestion in *Hart v. Samson*, *supra*, that "the courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes." But if it be true, which we very much doubt, that a state court is justified in giving to the judgments of its courts an effect which is denied them in the national courts, then non-resident claimants will avoid this result by keeping their litigation away from the state court.

It will be observed that the opinion in *Hart v. Samson*, 110 U. S. 151, proceeded principally on the ground that the jurisdiction in chancery in this class of cases was *in personam*, and that the action of the court must therefore necessarily be restricted to persons who were citizens or residents of the state. In several of the states an action may be brought by any person

against any other person who claims an interest in real property adversely to the former. There is nothing in the scope or nature of these actions to indicate that the courts in hearing and determining them is exercising a chancery jurisdiction, and it is possible that the judgments therein rendered are not within the rule laid down in *Hart v. Samson, supra*. At the same time these actions have none of the *indicia* of proceedings *in rem*, and we fear that judgments therein, if against non-residents, must be declared ineffectual for want of authority over the defendants.

ST. LOUIS, FORT SCOTT, AND WICHITA RAILROAD COMPANY v. IRWIN.

[37 KANSAS, 701.]

DUTY OF RAILROAD COMPANY TO ITS EMPLOYEES requires it to use such care in providing tracks and bridges that it will be reasonably safe for its employees to discharge the duties they are called on to perform.

RAILROAD COMPANY, FOR INJURIES CAUSED BY BRIDGE, the covering of which is so low as to strike an employee in the discharge of his duties, is answerable to him in damages, if he had no knowledge of its dangerous nature.

EMPLOYEES OF RAILROAD COMPANY SHOULD NOT BE SUBJECTED to unnecessary perils from structures over and along the track which might easily be changed or removed.

EMPLOYEE OF RAILROAD COMPANY ASSUMES ORDINARY risks incident to the service; and if he enters or continues in such service with a knowledge of danger, and without objection, he must abide the consequence.

EMPLOYEE OF RAILROAD COMPANY IS NOT REQUIRED TO KNOW ALL DEFECTS AND OBSTRUCTIONS of the road on which he is employed.

WHETHER CONDUCTOR OF TRAIN USES ORDINARY CARE in standing on a caboose for the purpose of giving necessary signals while his train is passing under a bridge, is a mixed question of law and fact.

IMPROPER LANGUAGE OF COUNSEL IN ARGUMENT OF CAUSE cannot be reviewed in this court, unless attention was called to it in the trial court, and a ruling had upon it there.

ACTION by W. H. Irwin to recover damages for personal injuries sustained by him while serving defendant as freight conductor in passing over a bridge. The defects in the bridge appear in the opinion. The cause was tried with a jury which awarded plaintiff twelve thousand dollars.

J. H. Richards, and Harris, Harris, and Vermilion, for the plaintiff in error.

Houston and Bentley, for the defendant in error.

By Court, JOHNSTON, J. It is earnestly contended by the plaintiff in error that the evidence is insufficient to sustain the finding that the railroad company was negligent in the

construction and maintenance of the bridge which occasioned the injury; and that even if the company was negligent, the testimony shows that at the time of the accident Irwin was not exercising that prudence and care which was required of him, and hence ought not to recover. The testimony shows that the bridge in question is built over the Walnut River about one half mile from the station at El Dorado. It was so constructed that the top beams were sufficiently high to permit a person standing on the center of the top of a box-car or caboose to pass through without colliding with these timbers, but there were braces, extending from the posts of the bridge to the top beams, which were only about four feet above the outer edge of the top of such cars. A person of ordinary height standing in the center of a car could pass through the bridge with safety, but was in danger of being swept from the cars if he stepped a foot or two from the center. Irwin was the conductor of a freight train, and was standing on the top of the caboose at the side of the cupola when he was struck by one of these overhead braces. The brace was so low that it struck him below the shoulders, and according to the testimony of one witness, it was only three feet and nine inches above the outer edge of the roof of the caboose. It was the duty of the railroad company to use ordinary care in providing tracks and bridges that would be reasonably safe for its employees in discharging the duties they were called on to perform. Brakemen and conductors of freight trains are frequently required to be on the top of the cars, both night and day. The hazards of such positions are great, and the duty of the company required that its employees should not be subjected to unnecessary perils from structures over and along the track which, by proper diligence on the part of the company, might be changed or removed. The necessity for a contrivance as dangerous as the overhead structure of this bridge was is not apparent. Indeed, it seems to have been otherwise planned, but was botched in the construction. E. S. Farnsworth, a witness for the company, and the engineer who furnished the plan for the bridge, stated that it was intended to be a standard Howe truss bridge in every particular, and that it was constructed of the usual height and width, and that the braces were a necessary part of the bridge, and that it was customary to put them in bridges in the same position and place as they were placed in the bridge at El Dorado. However, he stated that if the bridge was built according to

the plans, he could not conceive how an employee on the caboose of a train could be struck by one of these braces; and he further stated that it would be more than six feet from the outer top edge of an ordinary caboose to the braces in the bridge. F. W. Tanner, the general foreman of bridges for the railroad company, testified that he had had fifteen years' experience in building and constructing railroad bridges. He was asked: "Could these braces in a bridge properly constructed with due regard to the safety of employees be low enough to strike a man of ordinary size on top of a car of ordinary height and width?" He answered: "They should not, providing the car was on the track and passing through the bridge as it should do." James Standard, an assistant superintendent of bridges for the railroad company, of nineteen years' experience in the building and construction of railroad bridges, stated that a railroad bridge should be so constructed that there would be no danger of a man striking the braces on any part of an ordinary car.

This testimony would indicate that it was neither necessary nor intended in the first instance that the bridge should be so low as to be dangerous for employees to stand erect upon the top of any of the ordinary cars. It cannot be doubted that these facts were sufficient to go to the jury on the unsafe and unsuitable character of the bridge, and also sufficient to sustain the finding of the company's negligence in so constructing and maintaining it. With reference to such structures, Mr. Beach, in his work on contributory negligence, page 364, says: "If the roof or overhead structure of the bridge is so low that it will strike a brakeman standing erect on the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man-traps."

The same question was before the supreme court of Indiana, where a brakeman was swept from the top of a freight train by a low bridge, and severely injured. He had no knowledge that the bridge was low, or that it would interfere with the performance of his duty on top of the train while passing through. It was there urged that the defect, if any, was open and obvious, the dangerous character of which he had opportunity to ascertain, and the risk of which he assumed. The court ruled that it was the duty of the railroad company

to construct and maintain its roadway and overhead structures in such a condition that an employee can perform all the duties required of him with reasonable safety; and as the bridge was insufficient in height, of which fact the employee had no knowledge, the injury was the result of the company's negligence, and for which the employee was entitled to recover. The court referred to the cases relied on by the railroad company in the present case, but refused to follow them: *B. O. & C. R. R. Co. v. Rowan*, 104 Ind. 88; 23 Am. & Eng. R. R. Cases, 390; 3 N. E. Rep. 627.

Chicago & N. W. R. R. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206, was an action to recover damages for causing the death of a fireman. The train on which he was working was precipitated through a bridge which was defectively constructed and maintained, and he was immediately killed. The court, in speaking of the duty of the company, and the peril which the employee assumed when he entered its service, said: —

"The peril consisted in the defective construction of the road and its appurtenances, its culverts and bridges, which the fireman could know nothing about, and which he could not have discovered by the exercise of ordinary precaution and prudence; indeed, he was not required to know anything about that; the implied undertaking of his employers, that the road and culverts and bridges were properly constructed and safe for the passage of trains, was sufficient for him. He embarked in the service on the faith that it was a properly constructed road, and that his superiors were in the exercise of all the diligence necessary to keep it in good repair. . . . There is no rule better settled than this, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair, and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars. For their failure in this, and their employees not knowing the defects, and not contracting with express reference to them, the companies must be held liable for such injuries as their employees may suffer thereby."

The same doctrine was announced in *Illinois Cent. R. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593, where the plaintiff was injured while in the discharge of his duties as brakeman of a freight train, by an awning projecting from a station-house to

a dangerous position, and which knocked him from the top of a car while engaged in the discharge of his duty. It was held that this was such negligence as made the company liable for the damages sustained. *Chicago & I. R. R. Co. v. Russell*, 91 Id. 298, 33 Am. Rep. 54, was a case where a railroad company permitted a telegraph pole to stand for a period of three years so near to a side-track that it was within eighteen inches of passing freight trains, so that a brakeman in descending from the top of a freight-car while in motion, in the performance of his duty, came in collision with the pole, and was thrown from the car and killed. It was held to be culpable negligence in the railroad company to permit, for so long a time, such an obstruction to be in such close proximity to its track. *Chicago & A. R. R. Co. v. Johnson*, 4 N. E. Rep. 381, was an action to recover for a personal injury suffered by a brakeman on a freight train while passing through a covered bridge. In affirming a judgment in favor of the brakeman, the court approved of an instruction to the effect that where a railroad company constructs a bridge along the line of its road, it should build it of sufficient height so that persons employed by the railroad company as brakemen, and who are required to go upon the top of freight-cars in discharging their duty as brakemen while going through a bridge, may pass through and under the bridge without danger to their personal safety; and that the law does not require of a brakeman that he should absolutely know all the defects of construction, and all the obstructions there may be along the line of the road. In *Clark v. St. Paul & S. C. R. R. Co.*, 28 Minn. 128, a brakeman was killed by striking an awning which projected over a side-track, in such a position that its lowest projection would strike a man of ordinary height on the head, while it would not come in contact with a man standing eight inches or a foot aside from the center of the car. The brakeman was struck by the corner of the awning while engaged in the performance of his duty in moving freight-cars upon the side-track. The court held that the railroad company failed in its duty to the brakeman, and that if the brakeman had no knowledge of the peril, the company would be responsible for the injury: See also *Greenleaf v. D. & S. C. R. R. Co.*, 33 Iowa, 52; *Allen v. B. C. R. & N. R. Co.*, 57 Id. 623; *Dorsey v. Phillips and Colby Construction Co.*, 42 Wis. 583; *Walsh v. Oregon R'y & N. Co.*, 10 Or. 250; *H. & T. R'y Co. v. Oram*, 49 Tex. 342. The doctrines of these authorities more clearly accord with our views than

do some of those cited by the plaintiff in error. Most of the latter, however, were disposed of on the theory that the employee had actual knowledge of the peril which he encountered. In this case the jury have said, and not without testimony, that Irwin had no knowledge nor opportunity to know of the dangerous character of the bridge. It is true that he had run over the road and through the bridge daily for three months preceding the accident. He knew of the existence of the bridge, and that it was constructed with overhead timbers, but it does not necessarily follow that he was acquainted with the proximity of the braces to the top of the caboose or cars. When he entered the service of the company, he assumed the ordinary risks incident to the service; and if he enters or continues in the service with a knowledge of the risk or danger, and without objection, he must abide the consequences: *Jackson v. K. C. L. & S. K. R. R. Co.*, 31 Kan. 761; *K. P. R'y Co. v. Peavey*, 34 Id. 472; *Rush v. Missouri Pacific R'y Co.*, 36 Id. 129.

The law, however, does not require that an employee shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged; and it cannot be said that the peril in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty, and placed its track in such a condition that he could perform his duties with reasonable safety. The fact that a portion of the bridge was sufficiently high to clear a man's head while standing on top of a car, and other parts were not, made the bridge all the more deceptive and dangerous. Irwin, being a conductor, was not called to the top of the train so frequently as brakemen were, and hence would be less likely to notice the lowness of the timbers in the bridge. He testified that he supposed the bridge was sufficiently high so that it would be safe to stand on any part of the car. Several brakemen and others who passed through the bridge stated that they could not say from looking at the bridge that the braces were so low as to strike or injure one who was on top of a train. Men of experience say that it is a very difficult matter to tell exactly how high an object is above a moving train. The smoke of the engine and the side or swaying motion of the cars render it hard to see and comprehend the proximity of the overhead timbers of a bridge; and this is very well shown by the widely differing statements of the witnesses respecting the height of the

braces in question. It does not appear that Irwin had been on top of the cars while passing through the bridge more than once before the time of the accident; and he says that he knows of no other bridge on the road with braces so low as they are in this one. The plaintiff had unloaded freight from his train at the station at El Dorado, and in accordance with the directions of the train-master had backed down half a mile in order to make a run over a high grade, and over the crossing of the Atchison, Topeka, and Santa Fé railroad, which was a few yards beyond the station. A train on that road was approaching the crossing, and Irwin sent one of his brakemen to flag the crossing, while he ran back over the cars of his train to the caboose. He remained on top of the caboose to watch the Santa Fé train in order to give the necessary signal and avoid a collision. It seems that on the previous day his train had almost collided with the Santa Fé train at the same crossing. It is said that Irwin might have required a brakeman to perform the duty on top of the caboose instead of going there himself; but it appears that his action in that respect was not outside of the scope of his duties. Under all the testimony, we cannot say that the danger was so open and obvious that Irwin knew, or should have known, of it; nor can we say that he was guilty of contributory negligence. Whether he acted with ordinary care is a mixed question of law and fact which was proper for the determination of the jury, taking into consideration all the facts and circumstances. The jury has passed upon the question on competent testimony, and we are unable to say that its finding is unwarranted: *Huddleston v. Lowell*, 106 Mass. 282; *Conroy v. Vulcan Iron Works*, 62 Mo. 85; *Dale v. St. Louis etc. R'y Co.*, 63 Id. 455; *Wood on Master and Servant*, secs. 376, 385; and cases heretofore cited.

Complaint is made of the ruling of the court in refusing several instructions requested by the plaintiff in error. The third was a declaration that the company would not be liable if Irwin could have protected himself by the use of ordinary care. The court stated this rule favorably enough for the company, where it instructed that, "If the bridge in question was of sufficient height and width to enable employees, while in the discharge of their duties on top of freight and caboose cars in use at the time on defendant's road, to pass through it with safety, by the use of ordinary care to protect themselves from injury, then defendant would not be liable for plaintiff's injury. The law does not require the defendant to furnish a

bridge which the plaintiff could not be injured on, but is only required to furnish such a bridge as the plaintiff could pass through in safety, in the performance of his duties to the company, while exercising ordinary care for his personal safety."

The ninth request related to the knowledge of Irwin, holding that if he had knowledge of the bridge, or reasonable opportunity to know of its proximity to the top of the cars, he could not recover. The instruction as drawn was not exactly in harmony with the view we have taken, but the company has no cause to complain with respect to this rule, as the twentieth and twenty-second instructions given by the court stated that if he knew or had opportunity to inform himself of the condition of the bridge and the position of the braces, and their proximity to the top of the caboose, he could not recover; and further, that if he had a fair opportunity for acquiring a knowledge of the condition of the bridge and its danger while passing thereunder, if there was any, but ignored such knowledge or opportunity, and neglected to avail himself thereof, he cannot derive any advantage from such ignorance or want of knowledge, but his rights are to be determined the same as if he possessed the knowledge he might have acquired by the reasonable exercise of his faculties. The tenth request related to the duty of the company in the construction of the bridge, which duty was stated more fully and correctly in several instructions that were given. Objections are made to the twentieth and twenty-third instructions that were given. They relate to the rule fixing the liability of the company, where an employee has knowledge of the danger which he encounters. We do not think the criticisms of counsel are justified. But as the jury has expressly found that Irwin had no knowledge of the defect in the bridge, these instructions become unimportant.

We have examined the objections to the admission of evidence, and it is sufficient to say that we do not regard the rulings to have been prejudicial to the rights of the plaintiff in error.

One of the grounds for a new trial was the misconduct of counsel in his closing argument. The affidavits which were filed in the case show that the remarks of counsel were outside of the evidence, and were clearly improper. However, no objection to the remarks was made, except to the statement that Irwin would wait in misery and pain for the com-

ing-in of the jury, and that he hoped they would give more than the jury did before, to pay for the long trouble and the long work. The objection to this statement was promptly sustained by the court, and the attention of the court below was not called to any other of the objectionable statements. Of course the arguments should be confined to the facts brought out in the evidence, and it is error to allow counsel, over objections and exceptions, to discuss matters foreign to the evidence and prejudicial to the opposing party. But in exercising its appellate jurisdiction, this court is limited to the review of the alleged errors committed by the district court; and generally speaking, the attention of the trial court should be called to the improper language of counsel, and a ruling had upon the objection, in order to present the question here. There being no exception to the ruling on an objection, nor any unsustained objection, we cannot say the court erred: *State v. McCool*, 34 Kan. 613, 617.

Some other objections were made, all of which have been examined, but we find nothing in the case that will justify a reversal, and hence the judgment of the district court will be affirmed.

RAILROAD COMPANY MUST PROTECT EMPLOYEES FROM DANGER, by use of all reasonable safeguards: *Towns v. Vicksburg etc. R. R. Co.*, 55 Am. Rep. 506. Reasonable care required of master to avoid the exposure of servants to extraordinary risks: *Wonder v. Baltimore etc. R. R. Co.*, 3 Id. 143, and note. Ordinary care must be used by company in providing suitable structures, engines, and apparatus, and in furnishing safe and sufficient roadway: *O'Donnell v. Alleghany Valley R. R. Co.*, 98 Am. Dec. 336. For liability of railroad company to employees for injury sustained by low bridge, or other obstructions over or near the track, see *Broesman v. L. V. R. R. Co.*, 57 Id. 479, and cases there cited; *Hooper v. Columbia and Greenville R. R. Co.*, 53 Id. 691, and note; *Van Ambugh v. Vicksburgh R. R.*, 55 Am. Rep. 517; *Clark v. Richmond R. R.*, 49 Id. 394. When contributory negligence bars recovery: *Northern Central Railway Co. v. State, Use of Price*, 96 Am. Dec. 545; see *Wichita & W. R. R. Co. v. Davis*, *post*, p. 275. Negligence on part of injured party, what constitutes to bar recovery, and what questions considered by jury in determining whether such negligence existed: *Northern Central R. R. Co. v. State, Use of Price*, 96 Id. 545; *Spencer v. B. & O. R. R. Co.*, 54 Am. Rep. 269, and note. Servant assumes ordinary risks of his employment: *O'Donnell v. Alleghany Valley R. R. Co.*, 98 Am. Dec. 336.

WICHITA AND WESTERN R. R. Co. v. DAVIS.

[37 KANSAS, 742.]

CROSSING RAILROAD. — To entitle one to recover for injuries sustained while going over a railroad crossing he must, before attempting to cross, use reasonable and ordinary care to determine whether a train is approaching, and if he neglects so to do, he crosses at his peril.

NEGLIGENCE. — Where the undisputed facts show that no precaution has been taken to ascertain and avoid dangers by one injured at a railroad crossing, it then becomes a question of law for the courts.

WHERE THERE IS CONFLICT OF TESTIMONY AS TO DEGREE of care used by one who is injured in crossing a railroad, it is then a question for the jury.

SLIGHT CONTRIBUTORY NEGLIGENCE not clearly shown to have contributed to plaintiff's injury will not defeat his recovery when the employees of the defendant were grossly negligent.

THE defendant in error, plaintiff below, brought this action against the plaintiff in error to recover compensation for injuries sustained in crossing defendant's track. The plaintiff was a farmer, about sixty years of age. When returning home from Wichita, he passed out on Oak Street, which crosses the railroad track of defendant. On the south side of Oak Street, sixty-four feet west of the track, is a peach orchard, which for a distance obstructs the view of the track. South of this for several blocks were dwellings and elevators. There were two switches parallel with the main track, and on these at intervals, extending for some distance, were a number of loaded cars, two of which were partly on the crossing. The accident occurred between three and four o'clock in the afternoon, at which time the wind was blowing hard, and it was cloudy and very dusty. Plaintiff was driving a team hitched to a two-horse wagon, and on approaching the crossing, he looked both north and south. He saw cars on the side-track, but no engine or train. He drove on, and when the horses were partly over the main track, discovered a train backing towards him. The car nearest to him was a coal car, loaded with telegraph poles, some of which extended beyond the end of the car. Plaintiff was knocked out of the wagon by the car, and sustained injuries to his back and hips. The engine was in charge of the fireman, the engineer being absent. There was no one on the outside of the cars watching its movements. The trainman first saw plaintiff when he was driving on the track, and then the engine was reversed and the train stopped. Trial by jury at the February term, 1886. The plaintiff recovered judgment for six thousand dollars and costs. The defendant appeals.

George R. Peck, A. A. Hurd, and Robert Dunlap, for the plaintiff in error.

Campbell and Dyer, for the defendant in error.

By Court, CLOGSTON, C. Upon this record, the plaintiff in error raised but two questions, but as they are substantially one in fact, we shall discuss them as one, and that is, Did the injury occur by the contributory negligence of the defendant? The plaintiff in error now contends that on the facts found by the jury it was error not to direct the jury to return a verdict for the defendant, plaintiff in error. Upon this theory, it requested the court to instruct the jury as follows: "I instruct you that if the plaintiff, before driving upon the track of the defendant at which the injury complained of occurred, could at any time have seen the approaching train in time to escape by looking to the south, it will be presumed, as a matter of law, either that he did not look, or that if he did look, that he did not heed what he saw, and concluded to take the risks of attempting to cross in front of the approaching train; in which case, I instruct you that the plaintiff, if you so find the facts, was guilty of contributory negligence, contributing to his injury, and cannot recover in this case."

This instruction the court refused to give. The rule, as contended for by the plaintiff in error, is, that if the plaintiff could have seen, by carefully looking, the approach of the train, then it was negligence for him to drive over the track ahead of the train, knowing that the train was coming; or, if he failed to look, or if looking, failed to discover the train and drove upon the track and was injured, he cannot recover; or in other words, that if one does look and fails to discover what it would be possible for others to see, or under some circumstances might have been seen by the person so looking, then it is contributory negligence not to see. If this rule is the true one, then nothing short of the greatest care and caution will warrant a recovery for injuries received through negligence in the operation of trains. We do not understand the rule to be so far extended as to require the greatest care and caution, but only reasonable care, such as a man of ordinary prudence would exercise under similar circumstances: *Desmond v. Brown*, 29 Iowa, 54; 4 Am. Rep. 194; *L. L. & G. R. R. Co. v. Rice*, 10 Kan. 426. The rule seems to be well settled in this state, that before a person can recover for injuries received in crossing a railroad at a public road or street, he

must, before attempting to cross, recognize the danger and make use of the senses of hearing and seeing in determining whether a train is in dangerous proximity; and if he neglect this duty, and venture blindly upon the track without making an effort to ascertain whether a train is approaching, that he does so at his peril: *Clark v. Missouri Pac. R'y Co.*, 35 Id. 354. The supreme court of Iowa, in speaking of this question, said: "The instruction was properly refused. It requires too great a degree of care and circumspection. It makes no allowance for the ordinary imperfections of humanity. It requires absolute perfection of attention to surroundings, while the mind is concentrated upon a particular duty. So high a degree of caution the law does not enjoin. It requires only the exercise of reasonable and ordinary care": *Greenleaf v. Dubuque & S. C. R. R. Co.*, 33 Iowa, 57.

The supreme court of the United States, referring to an instruction similar to that contended for by the defendant, said: "It states such duty with the rigidity of a statute, making no allowances for modifying circumstances, or for accidental diversion of the attention to which the most prudent and careful are sometimes subject, and assuming in effect that the duty of avoiding a collision lies wholly, or nearly so, on one side": *Continental Improvement Co. v. Stead*, 95 U. S. 168. See *U. P. R'y Co. v. Adams*, 33 Kan. 427.

But where the undisputed facts show that this rule has been disregarded, and no precaution has been taken to ascertain and avoid dangers, it then becomes a question of law for the court, and not a question of fact to be submitted to the jury. Where there is a conflict of testimony that reasonable men might differ about, then it becomes a question of fact to be submitted to the jury. The plaintiff testified that he looked north and south, expecting to see a train; that a gale of wind was blowing, and it was very dusty; that he saw the cars on the side-track, and looked to see whether an engine was behind them, and saw none; and the fact that the train was moving backward,—are questions to go to the jury with the fact that the train was in view for some two blocks south of the crossing, and might have been seen. It was perhaps seen by the plaintiff, and mistaken, under the above conditions of the weather and the character of the train, and he thought it to be on the side-track. It was said in *Barnard v. Rensselaer & S. R. R. Co.*, 1 Abb. App. 131: "If there is any conflict in the evidence going to establish any of the circumstances upon which the question

depends, it must be left to the jury. If there are inferences to be drawn from the proof which are not certain and incontrovertible, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary prudence and care would be likely to do under the circumstances proved, this, involving as it generally must more or less conjecture, can only be settled by a jury."

In *Webber v. N. Y. Cent. etc. R. R. Co.*, 58 N. Y. 465, the court said: "It is true that the vigilance and caution of the traveler must be proportioned to the known danger of the injury; but it is also in a measure limited by the usual and ordinary signals and evidences of danger. The natural instinct of self-preservation ordinarily will lead to the employment of all the precaution which the situation suggests to an individual; and whether they are such as would occur to or be adopted by men of ordinary care and prudence must necessarily, in most cases, be left to the jury. The intelligence and judgment, as well as the experience, of twelve men, must settle a question of that character as one of fact, and not of law": *K. P. R'y Co. v. Richardson*, 25 Kan. 391; *U. P. R'y Co. v. Young*, 19 Id. 488; *K. P. R'y Co. v. Pointer*, 14 Id. 37; *Pa. R. R. Co. v. Weber*, 76 Pa. St. 157; 18 Am. Rep. 407; *Carr v. N. Y. Cent. etc. R. R. Co.*, 60 N. Y. 633; *Thurber v. Harlem etc. R. R. Co.*, 60 Id. 331; *Loucks v. Chicago etc. R. R. Co.*, 18 N. W. Rep. 651.

While this question is a close one, yet we do not feel called upon to disturb the judgment where it is so conclusively shown that the employees of the defendant in charge of the train were so grossly negligent in its management. Although the plaintiff may have been somewhat negligent, yet it is not clearly shown that his negligence contributed to the injury. If he saw the train after passing the orchard, and the train was then some distance south, he might with reasonable safety have crossed before it reached the crossing, provided the train was running only at such a rate of speed as it might properly run in a populous city. This court has repeatedly held that where the negligence of one party is great, and that of the other but slight, notwithstanding the slight negligence the party may recover: *Pacific R'y Co. v. Houts*, 12 Kan. 328; *K. P. R'y Co. v. Pointer*, 14 Id. 37; *Sawyer v. Sauer*, 10 Id. 466.

Under all the circumstances of this case, we do not find that the plaintiff was guilty of such contributory negligence as to prevent his recovery. It is therefore recommended that the judgment of the court below be affirmed.

MUST USE EYES AND EARS. — Before attempting to cross railroad track, one is bound to use his eyes and ears to determine whether a train is approaching, and if he neglects to do so he will be guilty of negligence: *Gonzales v. New York etc. R. R. Co.*, 98 Am. Dec. 58, and note.

CONTRIBUTORY NEGLIGENCE. — Person seeking to recover for injuries resulting from negligence of railroad company must be free from negligence contributing to such injuries: *Gonzales v. New York etc. R. R. Co.*, 98 Am. Dec. 58, and note; *Gaynor v. Old Colony etc. R'y Co.*, 97 Id. 96; *New Orleans etc. R. R. Co. v. Statham*, 97 Id. 478; *Louisville etc. R. R. Co. v. Sickings*, 96 Id. 320; *Baltimore etc. R. R. Co. v. State*, 96 Id. 528.

CONTRIBUTORY NEGLIGENCE BAR TO RECOVERY: *Potter v. Chicago etc. R'y Co.*, 94 Am. Dec. 548; *State v. Maine etc. R. R. Co.*, 49 Am. Rep. 622; *Martin v. Western Union R. R. Co.*, 99 Am. Dec. 189; *Frazer v. South etc. R. R. Co.*, 60 Am. Rep. 145; *Bardwell v. Mobile etc. R. R. Co.*, 56 Id. 842; *Darwin v. Charlotte etc. R. R. Co.*, 55 Id. 32.

NEGLECTANCE USUALLY QUESTION OF FACT: *Gonzales v. New York etc. R. R. Co.*, 98 Am. Dec. 58, and note; *Pennsylvania R. R. Co. v. Barnett*, 98 Id. 346; *Detroit etc. R. R. Co. v. Curtis*, 99 Id. 141.

SLIGHT NEGLIGENCE AS BAR TO RECOVERY: *Dreher v. Town of Fitchburg*, 99 Am. Dec. 91; slight negligence, ordinary care, and ordinary negligence defined: Id., and note.

CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT BAR RECOVERY: *Louisville etc. R. R. Co. v. Sickings*, 96 Am. Dec. 326, note.

WHAT CONSTITUTES NEGLIGENCE ON PART OF ONE INJURED TO BAR RECOVERY: *Baltimore and Ohio R. R. Co. v. State etc.*, 96 Am. Dec. 532, and note; *Northern Central R. R. Co. v. State*, 96 Id. 545.

FIREMAN RUNNING ENGINE — NEGLIGENCE. — Permitting fireman to run engine is a fact from which jury may find negligence on the part of the company: *O'Mara v. Hudson River R. R. Co.*, 98 Am. Dec. 61.

FAILURE TO RING BELL, AS REQUIRED BY STATUTE, AS QUESTION OF NEGLIGENCE: *O'Mara v. Hudson River R. R. Co.*, 98 Am. Dec. 61; *St. Louis etc. R. R. Co. v. Terhune*, 99 Id. 504.

BURDEN OF PROOF — CONTRIBUTORY NEGLIGENCE: *Indiana etc. R. R. Co. v. Greene*, 55 Am. Rep. 736.

OBLIGATION OF RAILROAD COMPANY TO GIVE WARNING OF APPROACHING TRAINS: *Pennsylvania R. R. Co. v. Barnett*, 98 Am. Dec. 346, note.

WHAT IS DUE CARE IS QUESTION FOR JURY: *Gaynor v. Old Colony etc. R'y Co.*, 97 Am. Dec. 96, and note. Care to be used by one crossing railroad track: Id.

REASONABLE CARE AS TO GIVING NOTICE OF APPROACHING TRAIN is a question of fact: *Byrne v. New York Central etc. R. R. Co.*, 58 Am. Rep. 512.

WHETHER ACT OF PLAINTIFF UNDER CIRCUMSTANCES WAS NEGLIGENCE: *Lawrence v. Green*, 59 Am. Rep. 428; *Gullim v. Lowell*, 59 Id. 102, and note; *Harris v. Hannibal etc. R. R. Co.*, 59 Id. 111, and note.

DEFENDANT NOT LIABLE WHERE INJURY TO PLAINTIFF was not proximate result of defendant's misconduct: *Jackson v. Nashville etc. R. R. Co.*, 49 Am. Rep. 663.

LIABILITY OF RAILROAD COMPANY FOR NEGLIGENT ACTS OF ITS SERVANTS: *Kline v. Central Pacific R. R. Co.*, 99 Am. Dec. 282, and note.

LIABILITY OF DEFENDANT FOR INJURIES SUSTAINED BY PLAINTIFF, limited to what cases: *Kline v. Central Pacific R. R. Co.*, 99 Am. Dec. 282, note 289.

NEGLECTENCE OF CARRIER OF PASSENGER, who is injured by the concurrent negligence of carrier and another, is not contributory negligence of such passenger: *Holsab v. New Orleans etc. R. R. Co.*, 58 Am. Rep. 177.

ADMISSIBILITY OF CONVERSATION OF AGENT OF RAILROAD COMPANY: *Pennsylvania R. R. Co. v. Books*, 98 Am. Dec. 229.

EVIDENCE OF SIZE OF PLAINTIFF'S FAMILY, his habits and pecuniary circumstances, when admissible: *Pennsylvania R. R. Co. v. Books*, 98 Am. Dec. 229, and note.

DAMAGES, WHAT INCLUDED AS SUCH, and amount, how determined: *Pennsylvania R. R. Co. v. Books*, 98 Am. Dec. 229, and note.

WHEN EXEMPLARY DAMAGES MAY BE FOUND: *New Orleans etc. R. R. Co. v. Statham*, 97 Am. Dec. 478, note 493.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

OAK v. DUSTIN.

[79 MAINE, 23.]

DEFENSE OF DURESS OF PRINCIPAL cannot be made by surety against whom no duress was employed.

SCIRE FACIAS. The principal was not a party to the action. The surety defended on the ground that the bond was obtained by duress of the principal.

Crosby and Crosby, for the plaintiff.

Thomas H. B. Pierce, for the defendant.

By Court, WALTON, J. This is an action of *scire facias* on a bail bond. The defense is duress. Not duress of the surety, against whom the action is brought, but duress of the principal in the bond, who is not sued. It is claimed that he was unlawfully arrested on a writ, the oath, as the defendant contends, not being sufficiently formal to justify his arrest. The defense cannot prevail. The person on whom the duress was practiced is the only one who can take advantage of it as a ground of defense. It cannot be set up by a stranger, nor by a surety, on whom no restraint was imposed: *Springfield Card Mfg. Co. v. West*, 1 Cush. 388; *Robinson v. Gould*, 11 Id. 55.

In the case last cited, it is said that this distinction rests on sound principle; that he only should be allowed to avoid his contract upon whom the unlawful restraint or fear has operated; that the contract of a surety, if his own free act, and

executed without coercion or illegal menace, should be held binding; that the duress of his principal cannot affect his free agency, or in any way control his action; that it may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence towards his neighbor; but that these can furnish no valid ground of defense against his contract, which he has entered into freely and without coercion.

The defense of duress not being open to the defendant, it is not important to inquire whether his principal was or was not unlawfully arrested. But it may not be improper to add that the authorities cited by the plaintiff's counsel seem to sustain the form of the oath and the legality of the arrest; and if so, then there was no duress of any one. But upon this point we express no opinion.

Judgment for plaintiff for \$101.86, with interest from date of the writ.

DURESS OF PRINCIPAL, WHEN DEFENSE FOR SURETY: Brandt on Suretyship, sec. 5; Baylies on Sureties and Guarantors, 217, 218.

BUNKER v. BARRON.

[79 MAINE, 62.]

MORTGAGE, CONVEYANCE, AND DEFEASANCE EXECUTED AT SAME TIME, and as parts of the same transaction, though upon different pieces of paper, constitute in law but one instrument, and that instrument is a mortgage.

PAYMENT IS PRESUMED PRIMA FACIE from the giving of a negotiable note for a simple contract debt. This presumption may be rebutted by any competent evidence showing that the intention of the parties was not to treat such note as a payment.

PAYMENT IS NOT PRESUMED from taking a negotiable note for an antecedent debt, when such debt is secured by a mortgage or other security.

MORTGAGE IS DISCHARGED ONLY BY PAYMENT OR RELEASE, and not by a change in or renewal of the note or debt which the mortgage was given to secure.

WRIT of entry. The defendants claimed that a deed under which plaintiff deraigned title, though absolute on its face, was, in law, a mortgage, and that such mortgage had been released and become inoperative by the mortgagee at a date subsequent to the mortgage, taking a negotiable note for a sum in which the original mortgage debt was included.

J. J. Partin, for the plaintiff.

D. D. Stewart and A. H. Ware, for the defendant.

By Court, FOSTER, J. The plaintiff claims the premises in question under a mortgage to him from William Quint, dated September 12, 1874. While the tenant in possession does not claim to own the premises, or any part thereof, his defense is based on a title, earlier in point of time, in William Barron, his father, whose agent or servant he is, in the occupation and possession of the premises. That title originated in this way: On January 7, 1868, William and Draxcy Quint, and Mary Quint, their mother, conveyed by warranty deed to John S. Paine, who, on the same day, and as part of the same transaction, gave back a bond to these parties, therein agreeing to reconvey the premises, being the farm where they then lived, upon payment to him by them of the sum of three hundred dollars, in annual payments of one hundred dollars each, in three, four, and five years from date; and also all other debts which the said Quints should thereafter contract with the said Paine. No notes accompanied these transactions. The bond was not recorded till May 26, 1876. November 7, 1874, the Quints obtained \$225 more from Paine; and William and Draxcy, on that day, conveyed to him by warranty deed another small parcel of land adjoining the home farm. February 1, 1875, in consideration of one hundred dollars paid by Paine, Lydia, the wife of William Quint, released her right of dower in the home farm. At the same time, William Quint gave Paine his note for \$872.34, and Paine gave him back a bond, therein agreeing to convey to him the farm and the other parcel named upon payment by said Quint of the said note. No part of this note has ever been paid. Paine conveyed the premises, and his title has come to William Barron, the defendant's father, under whom he is in possession.

The plaintiff claims that the deed of January 7, 1868, to Paine, and the bond back to the same parties, constituted a mortgage of the premises, and that the subsequent transactions of February 1, 1875, between William Quint and Paine, extinguished the mortgage, thereby letting in the plaintiff's title, upon which he bases this action to recover possession of the premises.

While we are of the opinion that the deed and instrument of defeasance executed at the same time and between the same parties constituted a *mortgage*, we feel confident that the same

was neither paid nor extinguished by what took place between William Quint and Paine, February 1, 1875. At that time, to be sure, everything due was reckoned up and embraced in the note of \$872.34. This included the amount specified in the first bond, the several notes which had been given from year to year as interest on that amount, the sum of about \$225 lent the November before, together with interest on all these sums up to the time the note was given. And we may well assume that it contained all the other indebtedness from the Quints contracted between the time when the first bond was given and the time when the note was dated, inasmuch as the first bond provided for the payment of all other debts, in addition to the specific sum therein named, which the obligees should thereafter contract with the obligor,—and inasmuch also, as William Quint himself states, that the note was given not only for the sum named in the first bond, but for “all other indebtedness to said Paine from us.” His testimony is that the note was given in payment of all matters between the Quints and said Paine. The question is, whether it was such payment as amounted to an extinguishment of the mortgage. Paine is dead, and his testimony is not before us. The circumstances surrounding the transaction, taken in connection with the evidence in the case, have an important bearing upon the question, and afford sufficient light by which we are enabled, we think, to judge correctly of the intention of the parties relative to that transaction.

It is the well-settled rule of law in this state, as also in Vermont and Massachusetts, that a negotiable note given for a simple contract debt is *prima facie* to be deemed a payment or satisfaction of such debt. But it is equally well settled, if not as frequent in its application, that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties: *Fowler v. Ludwig*, 34 Me. 460; *Dodge v. Emerson*, 131 Id. 467. From these and many other cases it may be seen that the presumption relates to the intention of the parties, and that such presumption may be rebutted by proof of facts or circumstances under which the negotiable paper was received, showing that it was not intended by the parties to operate as payment. Whenever it may properly be inferred that the parties did not so intend, the court, when invested with authority so to do, will ascertain and carry out the intention of the parties.

The circumstances which might have such an effect are so

numerous, even in the decided cases, that it would not be proper even if it were possible to enumerate them in a single opinion. Of the very many that have been spoken of by the courts, we may properly refer to a few as bearing somewhat upon the questions involved in the case before us.

Thus it has been held that where a note is taken in ignorance of the facts, or under a misapprehension of the rights of the parties, as where the negotiable paper is not binding on all the parties primarily liable, the presumption that it was taken in payment is rebutted: *Paine v. Dwinel*, 53 Me. 52; *Kidder v. Knox*, 48 Id. 555; *Melledge v. Boston Iron Co.*, 5 Cush. 170; 51 Am. Rep. 59; *Strang v. Hirst*, 61 Me. 15.

In a number of the decided cases it has been held that where the debt consists of a note secured by mortgage, the renewal of the note is not to be presumed a payment so as to discharge the mortgage: *Taft v. Boyd*, 13 Allen, 86; in which case it was held that there is no conclusive presumption that a note and mortgage taken for the amount found due upon a computation of the amounts of former notes secured by mortgages, as well as of mutual claims unsecured by mortgage, were accepted in payment and discharge of such former notes and mortgages.

In *Kidder v. Knox*, 48 Me. 555, it was laid down as a correct principle of law that whenever it appears that the creditor had other and better security than such note for the payment of his debt, it will not be presumed that he intended to abandon such security and rely upon his note.

To the same effect may be cited the case of *Lovell v. Williams*, 125 Mass. 442, in which the court say that the fact that such presumption of payment would deprive the creditor taking the note of the substantial benefit of some security, such as a mortgage, guaranty, or the like, would be sufficient evidence to meet and repel the presumption. And the same principle may be found in the following cases: *Maneely v. McGee*, 6 Id. 143; 4 Am. Dec. 105; *Cowan v. Wheeler*, 31 Me. 443; *Curtis v. Hubbard*, 9 Met. 328; *Tucker v. Drake*, 11 Allen, 147; *Parham Machine Co. v. Brock*, 113 Mass. 196. In the case last cited a bond with sureties was given, conditioned that the principal should pay for all purchases made by him from the obligee, and it was held that the bond remained in force, notwithstanding the obligee received the notes of the principal for purchases made by him. "Taking the notes, therefore," the court say, "did not extinguish the debt or discharge the

sureties. Even if the notes were treated as payment, the sureties would be held, for they bind themselves in terms to pay all notes given to the plaintiffs by Brock and Delano for machines purchased."

Moreover, in another case, where a bond was given, conditioned to secure the balance of account, and the debtor gave his negotiable promissory note to the creditor for the amount of the debt, and received a receipt from the creditor for the balance of account, it was held that the note was not intended as payment of the debt, or a discharge of the bond: *Butts v. Dean*, 2 Met. 76; 35 Am. Dec. 389.

"The general doctrine is, that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired": *Paine v. Dwinel*, 53 Me. 54.

In many if not most of the cases where the presumption of payment has been held to apply, it will be found that the original claim was not secured. But the cases are numerous in which this presumption has been held to be overcome by the facts and circumstances surrounding the transaction of giving the note, and in addition to those already cited may be added the following as among the more prominent: *Varner v. Nobleborough*, 2 Me. 125; 11 Am. Dec. 48; *Wilkins v. Reed*, 6 Me. 221; 19 Am. Dec. 211; *Descadillas v. Harris*, 8 Me. 304; *Mehan v. Thompson*, 71 Id. 501; *Parkhurst v. Cummings*, 56 Id. 159; *Perrin v. Keene*, 19 Id. 358; 36 Am. Dec. 759; *Atkinson v. Minot*, 75 Me. 193; *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Appleton v. Parker*, 15 Gray, 174; *Grimes v. Kimball*, 3 Allen, 520; *Holmes v. First Nat. Bank*, 126 Mass. 359; *Dana v. Binney*, 7 Vt. 493; *Seymour v. Darrow*, 81 Id. 122.

The facts in this case irresistibly repel the presumption that the note was intended as payment and discharge of the security of January 7, 1868. Not one dollar was paid at the time the note was given. Nor is it pretended that a dollar has actually ever been paid upon the mortgage since its first existence to the time this suit was brought. That mortgage was a lien upon the home farm. The mortgagee, on the very day the note was given, purchased the prospective right of dower from the wife of one of the mortgagors, paying therefor one hundred dollars. For what purpose, it may well be asked, was this purchase of the prospective right of dower in the farm from the wife of William Quint, if the intention of the mortgagee was, in taking the note in question, to release and

discharge his mortgage which he then held upon it? If he was a stranger to any title in the farm at the time he received the deed of the wife's dower, certainly it would amount to nothing to him, as nothing would thereby pass by such deed: *Harri-man v. Gray*, 49 Me. 537.

It is apparent from the transactions that the parties understood and intended, when the note was given, that the mortgagee should retain his title till the debt was paid. This is shown not only from the fact that the mortgagee at that time purchased in the dower interest, but also from the fact that in the bond given at that time the title to the farm is therein recognized as still remaining in the mortgagee. Nor could it be reasonably supposed that had not such been the understanding of the parties, the mortgagee would have been willing to release the most valuable security, and rely alone upon the individual name of William Quint and a piece of real estate which had but recently been purchased for the sum of \$225. This understanding and intention is also manifest from the fact that when the indebtedness of the Quints was reckoned up, and the note taken, and new bond given, there was no cancellation or surrender of the bond of January 7, 1868, neither was there any conveyance made or asked for in accordance with the terms of that bond: *Watkins v. Hill*, 8 Pick. 523.

In view of these facts and circumstances, together with the evidence before us, it is impossible to arrive at any other conclusion than that it was the intention of the parties, by their transactions of February 1, 1875, to leave the former security unaffected, and that the note was not intended as payment of the debt due at that time. There was a change in the form of the debt, but there was no actual payment of it. That is not enough to affect the mortgage. Nothing but payment of the debt, or its release, will discharge a mortgage: *Crosby v. Chase*, 17 Me. 369; *Parkhurst v. Cummings*, 56 Id. 159; *Ladd v. Wiggin*, 35 N. H. 426; 69 Am. Dec. 551. "The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt": *Jones on Mortgages*, sec. 924; *Pomroy v. Rice*, 16 Pick. 24.

At the time the plaintiff acquired his mortgage from William Quint, neither of the bonds which had been given by Paine had been recorded, and the apparent record title to the premises was in John S. Paine. The bonds were not placed upon

record till May 26, 1876,—more than a year and eight months after the plaintiff's title accrued, and then by his procurement. Moreover, as late as February 24, 1879, the plaintiff appears to have understood that Paine's mortgage was a valid, subsisting claim upon the premises, and that he held only the right of redemption under it, as appears by his statements in writing contained in the notice and demand by him on Paine's administrator for an account of the sum due on the mortgage.

Paine's interest passed and became vested in William Bar-ron, who is in possession, as the evidence discloses, by his agent or servant,—the defendant in this suit. The rights of the defendant are the same, therefore, as those of the person whom he represents by that possession. This action could not be maintained by the mortgagor against the mortgagee or his assignee in possession without showing a satisfaction of the mortgage. Neither can it be maintained by the grantee of the mortgagor: *Woods v. Woods*, 66 Me. 206; *Jewett v. Hamlin*, 68 Id. 172; *Rowell v. Jewett*, 71 Id. 409.

Judgment for the defendant.

CONVEYANCE ABSOLUTE IN TERMS, accompanied by a separate defeasance, is a mortgage: *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 42 Am. Dec. 240, and note 246; *Stephens v. Sherrod*, 55 Id. 776, and note 782.

NOTE GIVEN FOR SIMPLE CONTRACT DEBT is *prima facie* evidence of payment: *Shumway v. Reed*, 56 Am. Dec. 679, and note 681. That such evidence may be rebutted by showing the intention of the parties, see *Id.*; *Mellege v. Boston Iron Co.*, 51 Id. 59, and note 73.

NOTE GIVEN FOR ANTECEDENT DEBT is not payment of it: *Weymouth v. Sarborn*, 80 Am. Dec. 144, note 149; *Blunt v. Walker*, 78 Id. 709, and note 718; *McMurray v. Taylor*, 77 Id. 611, and note 613; *Nightingale v. Chaffer*, 23 Am. Rep. 531.

MORTGAGE CAN ONLY BE DISCHARGED by payment or by release: *Smith v. Stanley*, 58 Am. Dec. 771, note 773; *Ladd v. Wiggin*, 60 Id. 551, and note 553.

HUDSON v. COE.

[79 MAINE, 68.]

TENANT IN COMMON MAY MAINTAIN ACTION OF INDEBITATUS ASSUMPSIT against his co-tenant who has received more than his share of the rents and profits, and this, independently of section 20, chapter 95, of the Revised Statutes of Maine.

DISPUTE IN TITLE WILL NOT PREVENT TENANT IN COMMON from maintaining an action of *indebitatus assumpsit* against his co-tenant for receiving more of his share of the rents and profits, if the plaintiff was not dis-
seised of his estate at the date when such rents and profits were received.

IN ACTION OF INDEBITATUS ASSUMPSIT by one tenant in common against another, the plaintiff cannot recover any rents and profits received by defendant before plaintiff's title accrued.

ONE CO-TENANT DOES NOT DISSEISE ANOTHER by entering upon the land under a tax deed, and exercising such acts of ownership as tracing and running lines, paying taxes, and permitting wild grass, and occasionally timber, to be cut from year to year on various portions thereof.

ENTRY OF ONE CO-TENANT IS ENTRY OF ALL.

POSSESSION OF ONE CO-TENANT IS ALWAYS PRESUMED to be in accordance with a common title until some notorious and unequivocal act of exclusion occurs.

ASSUMPSIT by one tenant in common against his co-tenant to recover a share of stumpage collected by the defendant from the lands of the co-tenancy.

Charles A. Bailey, for the plaintiff.

A. W. Paine, for the defendant.

By Court, FOSTER, J. The parties to this suit are tenants in common and undivided of township number 2, range 8 north, of Waldo patent in Penobscot County, containing about thirty-six square miles. The plaintiff claims to recover, as owner of eleven ninety-sixths, his share of stumpage, which the defendant, as part owner of the township, has collected and retains in his hands. The action is general *indebitatus assumpsit* for money had and received, and is brought, not upon Revised Statutes, chapter 95, section 20, relating to actions between tenants in common, but at common law, based upon the statute of 4 & 5 Anne, c. 16, which is declared to be a part of the common law of this state: *Richardson v. Richardson*, 72 Me. 403.

1. The defendant contends that the plaintiff has no remedy at common law, and that if entitled to any, it can exist only by virtue of the Revised Statutes, chapter 95, section 20, after demand in a special action of *assumpsit*. We are not inclined to this view, and such, we think, is not the law.

The ancient rule of the old common law, as laid down by Lord Coke (Co. Lit. 199 b), was, that one tenant in common could not maintain an action against his co-tenant for taking the whole profits of the common estate, unless he had been appointed bailiff by his co-tenant. It was thus stated: "If one tenant in common maketh his companion his bailiff of his part, he shall have an action of account against him. But, although one tenant in common, without being made bailiff, take the whole profits, no action of account lies against him;

for, in an action of account, he must charge him either as a guardian, bailiff, or receiver, which he cannot do unless he constitute him his bailiff." Sole occupancy alone was not sufficient upon which to maintain an action. Each was said to occupy *per mi et per tout*, and had a right to occupy the whole, if the other tenant did not see fit to go in and occupy with him. Such occupancy was held to be no exclusion of the other, and no action would lie against the tenant who, by such occupancy, had taken the entire profits. But by statute 4 & 5 Anne, c. 16, sec. 27, this old doctrine of the common law of England was changed, and it was therein provided that an action of account might be maintained by one joint tenant or tenant in common against the other, charging him as bailiff for receiving more than his joint share or proportion. But in order to maintain such action, it was necessary that one tenant should show, not mere occupation of the premises by another tenant in common, but an actual receipt by him of the rents and profits over and above his share thereof, and which actually belonged to his co-tenant. To avoid the somewhat tedious proceedings pertaining to the old action of account, an action on the case upon a promise to account was at first substituted: *Brigham v. Eveleth*, 9 Mass. 541; and afterwards Lord Holt, in construing the statute, came to the conclusion that whenever account could be maintained, *indebitatus assumpsit* might be also; holding that the statute, being a remedial one, it ought to receive a liberal construction: *Jones v. Harraden*, 9 Id. 540. While the right of action was founded on the statute of Anne, and not by any right under the old common law, from the liberal construction placed upon it by a long series of decisions, it became as firmly settled that the action of general *indebitatus assumpsit* for money had and received would lie, in place of the old action of account, by one tenant in common against his co-tenant, as bailiff, for receiving more than his share of the rents and profits. Such was the doctrine laid down in the cases to which we have referred; and this form of action was sustained in *Miller v. Miller*, 7 Pick. 133, 19 Am. Dec. 264, and 9 Pick. 34, to recover money due for the share of one tenant in common in the sale of trees from the common estate. It was allowed in *Monroe v. Luke*, 1 Met. 459, which was *assumpsit* by one tenant in common against his co-tenant to recover his share of rents; and it was there held that where it was a claim for money actually received by the defendant, to which in some form the plaintiff

has title, it could be conveniently settled in this form of action. It is said in *Fanning v. Chadwick*, 3 Pick. 424, 15 Am. Dec. 233, that the action of account has become nearly obsolete in England, and that there seems to be no necessity for reviving it here, and that *assumpsit* now has all the advantages, without the disadvantages, peculiar to an action of account. In support of the same principle may be cited *Cochran v. Carrington*, 25 Wend. 410; *Richardson v. Richardson*, 72 Me. 403; *Gowen v. Shaw*, 40 Id. 58; *Cutler v. Currier*, 54 Id. 91; *Holmes v. Hunt*, 122 Mass. 513; 23 Am. Rep. 381; *Sargent v. Parsons*, 12 Mass. 152; *Dickinson v. Williams*, 11 Cush. 258; 59 Am. Dec. 142. It is an equitable form of action to recover money which the defendant, in equity and good conscience, ought not to retain.

But when resorted to as the common-law action, — the outgrowth of the statute of Anne, and independently of the Revised Statutes, chapter 95, section 20, — by one tenant in common against his co-tenant, it is to be "restricted to cases where the money has been actually received, and the liability to account has resulted in a duty to pay money, or where the defendant holds the share as bailiff of the plaintiff, or the occupation has been by consent": *Cutler v. Currier*, 54 Me. 91.

2. It is also claimed in defense that this action cannot be sustained, because the question of title is involved in it. But we have no doubt the action will lie, notwithstanding there may be a mere dispute raised by the defendant concerning the title, provided the plaintiff is owner of the estate, and was not disseised at the date when the income from the common estate was received in money by the defendant. Such is the conclusion of this court in the recent case of *Richardson v. Richardson*, *supra*. Were it otherwise, the plaintiff in any case seeking his common-law remedy under the statute of Anne, notwithstanding his title and seisin be complete, might be subjected to the annoyance as well as expense of a nonsuit, whenever the defendant co-tenant might see fit to dispute his title. We do not mean to be understood as denying the general doctrine, where it has its proper application, that the title to real estate is not to be tried in an action of *assumpsit*; but we are satisfied that it has no application in the present case. It must also be borne in mind that this is not an action for use and occupation of the common estate under the Revised Statutes, chapter 95, section 20, which is a modification of the statute of Anne, but of *indebitatus assumpsit* au-

thorized, through a long line of decisions, by the latter statute as the common-law action to recover the plaintiff's due proportion of moneys in the hands of the defendant which he has received from the common estate.

Many of the decisions to which our attention has been called, and in which it is held that the title to real estate cannot be tried in an action of *assumpsit*, are those for use and occupation depending upon contract, express or implied, between the parties, and which have no application to the case at bar.

There are many cases where the right to recover depends upon the title, yet they are not cases in which the title is tried, within the meaning of the rule. Neither does the rule prevent an action for money had and received in many cases which require an investigation of title, as was held in *Pickman v. Trinity Church*, 123 Mass. 6; 25 Am. Rep. 1.

The plaintiff in this action undoubtedly has the right to show his title and seisin to the estate owned by him at the time when the defendant received the income. Upon proof of these facts he would be entitled to his remedy under the statute of Anne. "If the defendant were in possession of the estate under a denial of the plaintiff's title, it would be evidence tending to show the disseisin of the plaintiff, and if it resulted in proof of that fact, — as it might well do if unexplained, — then, and not till then, would the relative position of the parties be changed": *Richardson v. Richardson*, *supra*.

To make out his title, then, the plaintiff starts with the unquestioned title to five ninety-sixths of the township by deeds from the heirs of Henry Ilsley who was the owner of one sixteenth in common and undivided in 1839; and to six ninety-sixths by levy of an execution upon a judgment recovered in the United States circuit court for the district of Maine, at the October term, 1841, in favor of the Merchants' National Bank of Newburyport, against Seth Paine and John L. Meserve, and from said bank through sundry conveyances to himself by deed bearing date of July 1, 1884.

It is in reference to the plaintiff's title under this levy that the defendant takes issue with the plaintiff, and a considerable portion of the argument of counsel has been devoted to this branch of the case. We do not deem it necessary, however, to enter upon an investigation of title under the levy, inasmuch as it is not claimed that the plaintiff obtained any title to the six ninety-sixths therein mentioned till July 1, 1884, — several months after the stumpage had been taken off,

and the money had been received by the defendant. If otherwise entitled to recover, the plaintiff can recover only his due proportion of such money as was received by the defendant from stumpage sold after his title accrued: *Kimball v. Lewiston Steam Mill Co.*, 55 Me. 499. From an examination of the deeds from the heirs of Henry Ilsley, it will be seen that the plaintiff at that time had acquired title to only four ninety-sixths of the township.

3. Admitting, however, the plaintiff's title through deeds from the heirs of Ilsley, the next ground of defense interposed to the plaintiff's action is that he and his predecessors in title have been disseised by the defendant and Samuel H. Blake,—the other tenant in common,—and that they have acquired by adverse possession for more than twenty years title to the whole township, and are entitled to retain the entire stumpage.

To establish this claim of disseisin, the defendant, who was the admitted owner of seven sixteenths and his alleged joint disseisor of another seven sixteenths,—the two owning seven eighths of the whole township,—puts in a tax title acquired by themselves of the entire township, and claims under this recorded deed, as color of title, a disseisin of their co-tenants.

The evidence upon which this claim of adverse possession and disseisin is based is detailed by the defendant,—in substance, consisting of acts of ownership exercised over this township, such as tracing and running lines, keeping off trespassers, permitting wild grass to be cut from year to year from small portions of it, and occasionally timber from other portions, paying taxes, etc. This whole township of thirty-six square miles was principally forest and timber land,—all in its natural and unimproved state. The question we are asked to consider in this case certainly presents the doctrine of disseisin somewhat diffusively applied. The cases are numerous, however, where acts even stronger than are furnished in this case are declared to be insufficient to work a disseisin even of the sole owner of unimproved lands: *Chandler v. Wilson*, 77 Me. 76; *Slater v. Jepherson*, 6 Cush. 129; *Parker v. Parker*, 1 Allen, 245; *Little v. Megquier*, 2 Me. 178; *Thompson v. Burhans*, 79 N. Y. 98, 99.

But acts which would properly be held to constitute a disseisin if done by a stranger have no such effect if done by a tenant in common, as the possession of one tenant in common is that of all. The entry of one is the entry of both. Either has the right to actual possession, and such possession will be

presumed to be in accordance with his title,—rightful rather than wrongful,—till some “notorious and unequivocal act of exclusion shall have occurred”: *Colburn v. Mason*, 25 Me. 434; 43 Am. Dec. 290. And by all the authorities it is settled that mere possession, accompanied by no act that can amount to an ouster of the other co-tenant, or give notice to him that such possession is adverse, will not be held to amount to a disseisin of such co-tenant: *McClung v. Ross*, 5 Wheat. 124. The acts of ownership by one tenant, which if done by a stranger would operate as a disseisin of the other co-tenant, must be done, as was said in *Ingalls v. Newhall*, 139 Mass. 273, “in the assertion of an independent title, inconsistent with that of the co-tenant, and be of such character that it is, or must reasonably be held to be, known by those in derogation of whose title they are done that this is so.” And it has been held that the entry of a tenant in common upon property, even if he takes the rents, cultivates the land, or cuts the wood and timber without accounting or paying for any share of it, will not ordinarily be considered as adverse to his co-tenants and an ouster of them, but in support of the common title: *Thornton v. York Bank*, 45 Me. 158.

This principle has been thus expressed by the Vermont court in the case of *Roberts v. Morgan*, 30 Vt. 325, in which the court say: “Where one joint owner is in possession of the whole, the legal presumption is, that he is keeping possession, not only for himself but for his co-tenant, according to their respective interests, and the other joint owners have the right to so understand until they have notice to the contrary; and the statute would only run from the time of such notice. We consider the principle substantially the same as between landlord and tenant, as to converting a mere fiduciary possession into an adverse or hostile one.”

The nature of the property in which the tenants are owners—its character, situation, and extent—must be taken into consideration, moreover, in determining the question of possession and occupation, and whether it is exclusive or otherwise. And between tenants in common it is very difficult to determine by any fixed rule what may constitute disseisin. Each case must be judged by its own particular circumstances and the facts connected with it.

In this case the facts are plain, and there is but little controversy concerning them. Nor do we consider it necessary to extend this opinion by any further reference to them. As

suming them all to be true, they do not show such exclusive possession, or such notorious and unequivocal acts of exclusion, as to amount to a disseisin of the plaintiff or his predecessors in title. The action, therefore, is maintainable.

The defendant admits that he received a certain amount of money from the sale of stumpage in the fall and winter of 1883-84. That sum was \$691.79. At the time this stumpage was taken from the township, the plaintiff had acquired title to only four ninety-sixths of it, and that is the proportion to which he is entitled of the money in the defendant's hands.

Judgment for plaintiff for \$28.82, with interest thereon from the date of the writ.

ASSUMPSIT WILL LIE BY ONE CO-TENANT against the other to recover his share of the rents and profits: *Fiquet v. Allison*, 86 Am. Dec. 54, and note; *Crane v. Waggoner*, 89 Id. 493; *Bruce v. Hastings*, 98 Id. 592, and note 595; *Early v. Friend*, 78 Id. 649, note on the subject 665; *Israel v. Israel*, 97 Id. 571.

ENTRY OF ONE CO-TENANT inures to the benefit of all: *Gossom v. Donaldson*, 68 Am. Dec. 723; *Warfield v. Lindell*, 77 Id. 614.

POSSESSION OF ONE CO-TENANT is presumed not to be adverse to his co-tenant: *Berthold v. Fox*, 98 Am. Dec. 243, and note 247; *Holley v. Hawley*, 94 Id. 350, note 358; *Bernecker v. Miller*, 93 Id. 309, note 311. And to rebut such presumption, actual ouster must be shown: *Israel v. Israel*, 96 Id. 571, and note 576.

KNAPP v. BAILEY.

[79 MAINE, 196.]

GRANTOR IS COMPETENT WITNESS AGAINST HIS GRANTEE to prove that the conveyance under which he had acquired an apparent title was given to secure a debt, and therefore constituted an equitable mortgage.

CONVEYANCE MAY IN EQUITY BE CONTROLLED BY ORAL EVIDENCE showing that it was given and received merely as security for a debt.

NOTICE OF TRUST. — Provision of the revised statutes of Maine, declaring that a purchaser for a valuable consideration cannot be defeated by a trust of which he has no notice, means actual notice.

ACTUAL NOTICE MAY BE EITHER EXPRESS OR IMPLIED.

IMPLIED NOTICE IS IMPUTED TO PARTY shown to be conscious of having means of knowledge which he does not use, as where he chooses to remain voluntarily ignorant, or is grossly negligent in not pursuing inquiries suggested by known facts.

ACTUAL NOTICE MAY BE PROVED BY DIRECT EVIDENCE, or inferred from circumstances.

ONE IS CHARGEABLE WITH ACTUAL NOTICE OF FACTS, if he has knowledge of such facts as would lead a fair and prudent man to make further inquiries, and if such inquiries, if pursued with ordinary diligence, would

have given him knowledge of the facts, with notice of which he is sought to be charged.

PURCHASER IS CHARGED WITH NOTICE that his grantor held title by what equity must declare to be an invalid deed, when such grantor was out of and had never been in possession, and others had controlled the property in many ways for many years, and when an examination of the registry of deeds would have shown conveyances inconsistent with the full validity of the deed under which the grantor claimed, and when the purchase was for a grossly inadequate price.

FACT THAT PURCHASER ACCEPTS QUITCLAIM DEED is a circumstance entitled to consideration in determining whether he is a *bona fide* purchaser without notice.

BILL to remove a cloud from title. The cloud consisted of a conveyance which the plaintiff insisted was given and accepted to secure the payment of a debt which had subsequently been paid.

A. W. Paine and C. P. Stetson, for the plaintiff.

D. F. Davis and Charles A. Bailey, for the defendant.

By Court, **PETERS, C. J.** This bill seeks to remove a cloud overhanging complainant's title to an undivided parcel of land,—in effect, to redeem the land from an equitable mortgage, the allegation being that the debt has been paid. We can have no reasonable doubt of the facts thus far alleged.

The defendant's grantor was called as a witness by the complainant. The defendant contends that his testimony was inadmissible, and cites cases which sustain the ordinary principle that a grantor cannot dispute with his grantee the title which he has assumed to convey. The objection goes to the testimony, and not to the witness personally. The principle of estoppel, which is invoked, is aimed, not against the witness because he is a grantor, but against any oral testimony to contradict the terms of a deed. As said by Judge Curtis, in answer to the same objection, "the facts to be proved were *dehors* the record, and one witness was as competent, in point of law [to prove them], as another." Where a grantor is allowed to prove a fact by another, he may do so by himself: *Holbrook v. Worcester Bank*, 2 Curt. 246,

It is true, as a general rule, that the effect of a deed cannot be controlled by oral evidence. But among the exceptions to the rule is, that, in equity, where the proof is clear and convincing, a deed absolute on its face may be construed to be an equitable mortgage. In *Rowell v. Jewett*, 69 Me. 293, this exceptional doctrine was first allowed to have operation in this

state. It was fully accepted in *Stinchfield v. Milliken*, 71 Id. 567, where the opinion says: "But the transaction was in equity a mortgage,—an equitable mortgage. The criterion is the intention of the parties. In equity, this intention may be ascertained from all pertinent facts, either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. The real intention governs." In *Lewis v. Small*, 71 Me. 552, the same doctrine is admitted. It has since been affirmed in other cases, receiving an able discussion in the late case of *Reed v. Reed*, 75 Id. 264. The effect of many of the older cases in this state has been swept away by this new principle in our legal system, a product of the growth of the law, very greatly promoted by legislative stimulation. The present case must be governed by the equitable rule declared in the later decisions.

Another question presented by the case is, whether the statutory provision (R. S., c. 73, sec. 12) which declares that a title of a purchaser for a valuable consideration cannot be defeated by a trust, unless the purchaser had notice thereof, means actual or constructive notice. Section 8 of the same chapter requires "actual notice" of an unrecorded deed to defeat a subsequent purchaser's title from the same grantor. The two sections were incorporated in our statutory system at the same time,—in the revision of 1841. One requires "notice," the other "actual notice."

We think the difference in phraseology may be accounted for partly on the idea that section 8 would be applicable more to law cases, and section 12 more to questions in equity. We can have no doubt that there may be cases of constructive trusts where section 12 would apply. At the same time where the facts present questions analogous to those ordinarily arising under the other section, we think actual notice would be required; that under either section, in cases generally, actual notice, as we understand the meaning of the term, would be the rule; and that actual notice applies in the present case.

There is a conflict in the cases and among writers as to what is actual notice. Much of the difference is said to be verbal only,—more apparent than real. Certain propositions, however, are quite well agreed upon by a majority of the authorities.

Notice does not mean knowledge,—actual knowledge is not required. Mr. Wade describes the modes of proving actual

notice as of two kinds. One he denominates express notice, and the other implied. "Implied, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest": Wade on Notice, 2d ed., sec. 5. Some writers use the word "implied" as meaning constructive, and would regard what is here described to be implied actual notice as constructive notice merely. As applicable to actual notice, such as is required by the sections of the statute under consideration, we think the classification of the author, whom we quote, is satisfactory.

The author further explains the distinction by adding that "notice by implication differs from constructive notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly legal inference, while implied notice arises from inference of fact."

It amounts substantially to this, that actual notice may be proved by direct evidence, or it may be inferred, or implied (that is, proved), as a fact from indirect evidence,—by circumstantial evidence. A man may have notice, or its legal equivalent. He may be so situated as to be estopped to deny that he had actual notice. We are speaking of the statutory notice required under the conveyances act. A higher grade of evidence may be necessary to prove actual notice appertaining to commercial paper: *Kellogg v. Curtis*, 69 Me. 212; 31 Am. Rep. 273.

The same facts may sometimes be such as to prove both constructive and actual notice; that is, a court might infer constructive notice, and a jury infer actual notice from the facts. There may be cases where the facts show actual, when they do not warrant the inference of constructive notice; as where a deed is not regularly recorded, and not giving constructive notice, but a second purchaser sees it on the records, thereby receiving actual notice: *Hastings v. Cutler*, 24 N. H. 481.

Mr. Pomeroy (2 Eq. Jur., sec. 596, note) summarizes the effect of the American cases on the point under discussion in the following words: "In a few of the states the courts have interpreted the intention of the legislature as demanding that the personal information of the unrecorded instrument should

be proved by direct evidence, and as excluding all instances of actual notice established by circumstantial evidence. In most of the states, however, where this statutory clause is found, the courts have defined the 'actual notice' required by the legislature as embracing all instances of that species in contradistinction from constructive notice, — that is, all kinds of actual notice, whether proved by direct evidence or inferred as a legitimate conclusion from circumstances."

The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser, before buying, should clear up the doubts which apparently hang upon the title by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which, by ordinary diligence, he would have ascertained. He has no right to shut his eyes against the light before him. He does wrong not to heed the "signs and signals" seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice, is proof of notice: 3 Washburn on Real Property, 3d ed., 335.

It must be admitted that our present views are not fully supported by the case of *Spofford v. Weston*, 29 Me. 140, a decision made forty years ago. But the doctrine has grown liberally since that day, and the correctness of some things pronounced in that opinion is virtually denied in subsequent cases: *Porter v. Sevey*, 43 Id. 519; *Hull v. Noble*, 40 Id. 459; *Jones v. McNarrin*, 68 Id. 334; 28 Am. Rep. 66. Many cases which affirm the doctrine contended for by the complainant, as well as many opposing cases, are cited by the text-writers: *Wade on Notice*, secs. 10, 11, et seq., and cases in notes; 2 *Pomeroy's Eq. Jur.*, sec. 603, and notes. The decided preponderance of authority supports the position that the statutory "actual notice" is a conclusion of fact, capable of being established by all grades of legitimate evidence.

As to what would be a sufficiency of facts to excite inquiry, no rule can very well establish; each case depends upon its own facts. There is a great inconsistency in the cases upon this point. But we are satisfied that in the case before us the defendant must be charged with notice that his grantor held title by what equity must declare to be an invalid deed. He

saw that the grantor was out of possession. He could have easily ascertained that he never had possession. He knew that others had controlled the property in many ways for many years. He examined the registry, where he discovered the deed in question, and there must have seen evidence of other conveyances inconsistent with its full validity. He purchased the property for forty dollars, while worth, had the title been perfect, nearer one thousand dollars. He took a quitclaim deed, and it is held by some courts that such an instrument of conveyance does not make him a *bona fide* purchaser without notice: *Baker v. Humphrey*, 101 U. S. 494; although in our system it is a circumstance only bearing on the question: *Mansfield v. Dyer*, 131 Mass. 200. More than all else, perhaps, the defendant made no inquiry of the grantor whether he had any real title or not, asking no explanations, but insisting to him that he had no valuable title. It is impossible for us to say, in the light of these impressive, illuminating proofs, that the defendant purchased without notice. He purchased on the basis of a merely nominal title.

We would not say that he did not believe he could legally purchase, encouraged as he was by the doctrine of the earlier cases, now abrogated; nor do we impute more than a want of caution and diligence. Men's interests spur their judgments to one-sided conclusions oftentimes. The great dramatist makes a character, reluctant to acknowledge the situation, say, "I cannot dare to know that which I know"; while another, more quick-sighted, because anxious to believe, exclaims, "Seems, madam! Nay, it is. I know not seems." One rejects proof on the clearest facts; the other accepts it on the slightest.

Judgment affirmed.

NOTICE MAY BE EITHER EXPRESS OR IMPLIED: *McMechan v. Griffing*, 15 Am. Dec. 198.

ACTUAL NOTICE, WHAT FACTS SUFFICIENT TO CONSTITUTE: *Lodge v. Simonton*, 23 Am. Dec. 36, and extended note 47; *Hoy v. Bramhall*, 97 Id. 687, and note 695; *Allen v. McCalla*, 96 Id. 56, note 64; *Gibson v. Winslow*, 84 Id. 553, note 556.

IMPLIED OR CONSTRUCTIVE NOTICE FROM WHAT ARISES: Note to *Lodge v. Simonton*, 23 Am. Dec. 47; *Converse v. Blumrich*, 90 Id. 230, note 242.

ACTUAL NOTICE MUST BE SHOWN BY CLEAR PROOF: *McMechan v. Griffing*, 15 Am. Dec. 198.

ACTUAL NOTICE OF TRUST MUST BE CLEARLY PROVED: *Wilson v. McCullough*, 63 Am. Dec. 347.

PURCHASER FROM ONE NOT IN POSSESSION is chargeable with what notice and duty: *Smith v. Yule*, 89 Am. Dec. 167, and note 171, 172.

TYLER v. CARLISLE.

[79 MAINE, 210.]

MONEY LOANED WITH INTENT ON PART OF LENDER that it shall be used for gambling purposes by the borrower cannot be recovered if so used.

MONEY LOANED FOR GAMBLING PURPOSES, but not so used by the borrower, may be recovered of him by the lender.

ASSUMPSIT for money loaned by plaintiff to defendant. Defendant claimed that it was a gambling debt. The instructions to the jury sufficiently appear from the opinion. Verdict for defendant.

C. E. Littlefield, for the plaintiff.

J. E. Hanley, for the defendant.

By Court, **PETERS, C. J.** The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was, that if the plaintiff let the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct.

Any different doctrine would in most instances be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice: *Green v. Collins*, 3 Cliff. 494;

Gaylord v. Soragen, 32 Vt. 110; 76 Am. Dec. 154; *Hill v. Spear*, 50 N. H. 252; 9 Am. Rep. 205; *Peck v. Briggs*, 3 Denio, 107; *McIntyre v. Parks*, 3 Met. 207; *Bancher v. Mansel*, 47 Me. 58; see 68 Id. 47.

Nor was the branch of the ruling wrong, that plaintiff, even though a participator, could recover his money back, if it had not been actually used for illegal purposes. In minor offenses, the *locus penitentiae* continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract, or the illegal purpose has not been put in operation. The lender can cease his own criminal design, and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract": Wharton on Contracts, sec. 354, and cases there cited. The object of the law is to protect the public, — not the parties. "It best comports with public policy to arrest the illegal transaction before it is consummated," says the court in *Stacy v. Foss*, 19 Me. 335; 36 Am. Dec. 755; see *White v. Franklin Bank*, 22 Pick. 181.

The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved.

Exceptions overruled.

TO INVALIDATE LOAN FOR GAMBLING PURPOSES, the lender must not only have known the use intended, but must have been implicated as a confederate, though not necessarily for gain: *Waugh v. Beck*, 60 Am. Rep. 354; and see *Hardy v. Hunt*, 70 Am. Dec. 787, and note 791. In *Morgan v. Groff*, 49 Id. 273, it is held that money so loaned cannot be recovered though not used. In *Lewin v. Johnson*, 32 Hun, 408, it was held that it is no defense to an action for the purchase price of whisky that the purchaser, an innkeeper, having no license, intended to sell the same by the glass, in violation of the excise law, and that the seller knew that he had no license, and intended so to sell the whisky purchased. The court said: "The question presented is, whether the prior knowledge by a vendor of merchandise that the purchaser intends to make an unlawful use of the articles sold will prevent a recovery of the purchase price. It is now well settled by the authorities in this state that it will not. The precise question was presented and decided in *Tracy v. Talmage*, 14 N. Y. 162 [67 Am. Dec. 132], where the court laid down this proposition: 'That it is no defense to an action brought to recover the price of goods sold that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose, and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design. . . . I think it clear in reason, as well as upon authority, that in a case like this, where the sale is not neces-

sarily *per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase-money.' This statement of the law remains undisturbed and unquestioned, and has been frequently referred to since by the same court with approval. In *Arnott v. Pittston and Elmira Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, the rule of law on the question before us was stated to be the same as laid down in *Tracy v. Talmage*, and substantially in the same language, to wit: 'A vendor of goods may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser.' An English case, *Hodgson v. Temple*, 5 Taunt. 181, directly in point, may be cited, which gives the law in England on the same question. In this case, a buyer of spirituous liquors was known to be carrying on a rectifying distillery and a liquor shop at the same time, contrary to law. The vendors of the spirits were allowed to recover the price. Sir James Mansfield said: 'The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction.' In other English cases the same rule of law is stated, some of them being cited and commented upon and approved in *Tracy v. Talmage*, *supra*. The learned counsel for the defendant cites us to the cases of *Hull v. Ruggles*, 56 N. Y. 424, and *Arnott v. Pittston and Elmira Coal Co.*, 68 Id. 558, 23 Am. Rep. 190, in support of his position that the sellers are *particeps criminis* with the purchaser in his illegal purpose and transactions. On a careful examination of these cases, it will be observed that in each instance the suit was to recover the contract price of goods sold, the court holding that the contract in terms was to do an unlawful and illegal act. The court at the same time remarking that the cases were distinguishable from *Tracy v. Talmage*, and the law as there stated approved": See *Brunswick v. Valleau*, 50 Iowa, 120; 32 Am. Rep. 119, and note 122; *Wallace v. Lark*, 12 S. C. 576; 32 Am. Rep. 516; *Henderson v. Waggoner*, 2 Lea, 133; 31 Am. Rep. 591; *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547.

TUFTS v. SYLVESTER.

[79 MAINE, 218.]

RIGHT OF STOPPAGE IN TRANSITU is favored by the law.

INSOLVENT VENDEE MAY REFUSE TO TAKE POSSESSION and thus leave unimpaired the right of stoppage *in transitu*.

GOOD STOPPAGE IN TRANSITU IS EFFECTED when an insolvent purchaser gives notice of his inability to pay to the vendor, and leaves the goods when they arrive in the possession of some person for the vendor, the latter expressly or tacitly assenting.

RIGHT OF STOPPAGE IN TRANSITU may be effected by demand upon the carrier and an insolvency messenger, when the vendee becoming insolvent has countermanded the order of purchase and refused to receive the goods, and his messenger in insolvency, before an assignee is appointed, has accepted the goods from the carrier and paid the charges thereon.

MESSENGER APPOINTED FOR INSOLVENT VENDEE cannot receive goods so as to terminate the right of stoppage *in transitu*. He acts in a passive ca-

capacity merely as custodian, until an assignee is appointed, and has no more authority *ex officio* than a carrier or middleman. Therefore while the goods are in his hands the right of stoppage may be exercised.

Belcher, for the plaintiff.

Whitcomb, for the defendant.

By Court, PETERS, C. J. The plaintiff sold a bill of goods to be shipped at Boston to the buyer at Farmington in this state. The buyer, becoming insolvent after the purchase, countermanded the order, but not in season to stop the goods. Before the goods came he had gone into insolvency, and a messenger had taken possession of his property. An express company, bringing the goods, tendered them to the buyer, who refused to receive them, but the messenger accepted the goods from the carrier, paying his charges thereon. After this, but before an assignee was appointed, the seller made a demand upon both the carrier and the messenger, attempting to reclaim his goods. The question, upon these facts, is, whether the goods were seasonably stopped *in transitu* to preserve the plaintiff's lien thereon. We think they were. The right of stoppage *in transitu* is favored by the law.

It is clear that the goods did not go into the buyer's possession. He refused to receive them. He had a moral and legal right to do so. Such an act is commended by jurists and judges. He in this way makes reparation to a confiding vendor. "He may refuse to take possession," says Mr. Benjamin, "and thus leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in getting possession by the assignees of the buyer": Benjamin on Sales, sec. 858. In *Grout v. Hill*, 4 Gray, 361, Shaw, C. J., says: "Where a purchaser of goods on credit finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor, on such notice, expressly or tacitly assents to it, it is a good stoppage *in transitu*, although the bankruptcy of the vendee intervene": See same case at page 369; 1 Parsons on Contracts, *596, and cases.

The decision of the case, then, turns upon the question whether the messenger could accept the goods and terminate the lien of the vendor. We do not find any authority for it. A bankruptcy messenger acts in a passive capacity, is intrusted with no discretionary powers, acts under mandate of court, or does certain things particularly prescribed by the

law which creates the office, is mostly a keeper or defender of property, a custodian until an assignee comes, and he can neither add to or take from the bankrupt's estate. He is to take possession of the "estate" of the insolvent. These goods had not become a part of the estate. He was not at liberty to affirm or disaffirm any act of the insolvent. The law imposes on him no such responsibility. Chancellor Kent says that the transit is not ended while the goods are in the hands of a carrier or middleman. A messenger has no greater authority, *ex officio*, than a middleman, excepting as the insolvent law expressly prescribes. In Hilliard on Bankruptcy, 101, the office of a messenger is likened to that of a sheriff under a writ; he becomes merely the recipient of property. The title of the assignee, when appointed, dates back of the appointment of a messenger. Until appointment of assignee, the bankrupt himself is a proper person to tender money for the redemption of land sold for taxes: *Hampton v. Rouse*, 22 Wall. 263; see *Stevens v. Palmer*, 12 Met. 464. The case cited by the plaintiff, *Sutro v. Hoile*, 2 Neb. 186, supports his contention.

Defendant defaulted.

RIGHT OF STOPPAGE IN TRANSITU, how exercised and when terminated. *Hause v. Judson*, 29 Am. Dec. 377, and note 384-394; *Rucker v. Donovan*, 19 Am. Rep. 84, note 87; *Allen v. Maine etc. R. R. Co.*, *post*, p. 310, and note.

ROYAL v. CHANDLER.

[79 MAINE, 265.]

DECLARATIONS IN DISPARAGEMENT OF TITLE, made by the grantor while owner of the land, are admissible in evidence in favor of one claiming adversely to the grantee, and cannot be impeached by later and contradictory statements made by the grantor, after he parted with the title.

Swasey and Dresser, for the plaintiff.

N. and J. A. Morrill, for the defendant.

By Court, PETERS, C. J. This, a real action, involves the location of the line between the plaintiff's and defendant's premises.

A person, now deceased, who was once an owner in plaintiff's land, while an owner and upon the land, made declarations respecting the line favorable to the defendant's claim. These admissions in disparagement of his own title were properly

proved at the trial by the defendant. To detract from the force of this evidence, the plaintiff was allowed to prove later and contradictory statements made by the same person under other circumstances when he was not upon the land. The last declarations were not admitted as original, primary evidence, but to contradict the first declaration. What the former owner said for himself was admitted to impeach what he had previously said against himself. The last declarations were not admissible. It was not a legal contradiction. It was unsworn evidence.

The fallacy of the idea allowing the testimony to be received consists in looking upon the former owner as a witness in the cause. The first declarations were made by him while standing in a condition the same as if a party to the present suit. His admissions against his own title were of the same quality of evidence as if spoken by the plaintiff himself. If a man's conversation in his favor be admitted against what he has said against his interest, then he would certainly be allowed to corroborate one statement by consistent statements made at other times, and no limit could be fixed in respect to such evidence. Opening the door so widely would lead to mischievous results.

The question in the ruling does not appear to have received attention in our own state. It has been several times considered in Massachusetts, and is there in each instance disposed of unfavorably to the plaintiff here. The case of *Baxter v. Knowles*, 12 Allen, 114, meets the point exactly, where it is said: "The declarations of the defendant's testator, from whom he claimed title, were not made admissible in his favor by the fact that his declarations at other times were given in evidence by the plaintiff as admissions." *Pickering v. Reynolds*, 119 Mass. 111, is also precisely in point.

Exceptions sustained.

DECLARATIONS BY GRANTOR IN DISPARAGEMENT OF TITLE while he held it are admissible against his grantee: *Dow v. Jewell*, 45 Am. Dec. 371, and note 381; note to *Horton v. Smith*, 42 Id. 631; *Newlin v. Osborne*, 67 Id. 269, and note 270. But declarations of the grantor, made after the conveyance, are not admissible against the grantee: *Beeckman v. Montgomery*, 80 Id. 229, and note 234; *McDowell v. Goldsmith*, 61 Id. 305, and note; *contra: Thompson v. Thompson*, 68 Id. 638, but see note 648.

GILLEY v. GILLEY.

[79 MAINE, 292.]

AFTER DIVORCE A VINCULO DECREED WIFE for husband's "desertion and failure to support," without provision for alimony or custody of children, the husband is still liable for the necessary support of the children of the marriage during their minority.

DURING HIS LIFETIME FATHER IS ENTITLED to the services and earnings, and liable for the support of his minor children, independent of statute or decree; but during such period the wife is not entitled to the services of, nor is she bound to support, such children.

DECREE OF DIVORCE, WITHOUT PROVISION FOR CUSTODY OF CHILDREN of the marriage, does not affect the parental relation between the parties and their children. The husband is still liable for their support during minority.

Baker, Baker, and Cornish, for the plaintiff.

S. and D. Titcomb, for the subsequent attaching creditor, who appeared and defended, instead of the defendant.

By Court, VIRGIN, J. *Assumpsit* by the mother against the father for their young children's necessary support furnished after a divorce *a vinculo* decreed to her for his "desertion and failure to support," he having been absent from the state several years prior to the decree and never having returned or furnished any support whatever during the time, and no decree for alimony or custody of the children having been made.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support, and educate them during infancy and early youth, and it continues until their maturity, when the law determines that they are capable of providing for themselves: *Benson v. Remington*, 2 Mass. 113; *Dawes v. Howard*, 4 Id. 98; *Nightingale v. Withington*, 15 Id. 274; 8 Am. Dec. 101; *State v. Smith*, 6 Me. 462, 464; *Dennis v. Clark*, 2 Cush. 352, 353; 48 Am. Dec. 671; *Reynolds v. Sweetser*, 15 Gray, 80; *Garland v. Dover*, 19 Me. 441; *Van Valkinburgh v. Watson*, 13 Johns. 480; 7 Am. Dec. 395; *Furman v. Van Sise*, 56 N. Y. 435, 439, 445, 446; 15 Am. Rep. 441; 2 Kent's Com. 190 et seq.; Schouler on Domestic Relations, 321.

In *Dennis v. Clark*, *supra*, the court said: "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a

husband is bound by the same law, and by the common law of England, to support and provide for his wife. And if a husband desert his wife, or wrongfully expel her from his house, and make no provision for her support, one who furnishes her with necessary supplies may compel the husband, by an action at law, to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." This upon the ground of agency: *Reynolds v. Sweetser*, *supra*; *Hall v. Weir*, 1 Allen, 261; *Camerlin v. Palmer Co.*, 10 Id. 539. But a minor, who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account, even for necessities: *Weeks v. Merrow*, 40 Me. 151; *Angel v. McLellan*, 16 Mass. 27; 8 Am. Dec. 118. Otherwise, a child, impatient of parental control, while in his minority, would be encouraged to resist the reasonable control of his father, and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint: *White v. Henry*, 24 Me. 533.

Moreover, in actions for seduction, whereof loss of service is the technical foundation, the loss need not be proved, but will be presumed in favor of the father, who has not parted with his right to reclaim his minor daughter's service, although she is temporarily employed elsewhere: *Emery v. Gowen*, 4 Me. 33; 16 Am. Dec. 233. "And this rule results from the legal obligation imposed upon him to provide for her support and education, which gives him the right to the profits of her labor": *Blanchard v. Ilsley*, 120 Mass. 489; 21 Am. Rep. 535; *Kennedy v. Shea*, 110 Mass. 147; 14 Am. Rep. 584; *Emery v. Gowen*, *supra*; *Furman v. Van Sise*, 56 N. Y. 435, 444; 15 Am. Rep. 441.

So also in that large class of cases wherein needed supplies, furnished by the town to minor children, between whom and their father, though they lived apart, the parental and filial relations still subsisted, are considered in law supplies indirectly furnished the father,—the reason is, because he was bound in law to support them: *Garland v. Dover*, 19 Me. 441.

We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child, and that in the absence of any contract on the part of the father, he cannot be held, except under the pauper laws of those states, which are sub-

stantially like our own: *Kelley v. Davis*, 49 N. H. 187; 6 Am. Rep. 499; *Gordon v. Potter*, 17 Vt. 348.

But as before seen, the law was settled otherwise in this state before the separation, and has been frequently recognized in both states since; and we deem it the more consistent and humane doctrine.

It is also settled that at least during the life of the father, the mother, in the absence of any statutory provision, or decree relating thereto, not being entitled to the services of their minor children, is not bound by law to support them: *Whipple v. Dow*, 2 Mass. 415; *Daves v. Howard*, 4 Id. 97; 2 Kent's Com. *192; *Weeks v. Merrow*, 40 Me. 151; *Gray v. Durland*, 50 Barb. 100; *Furman v. Van Sise*, *supra*, both opinions; R. S., c. 59, sec. 24.

This leads to an inquiry into the effect of the divorce *a vinculo* alone, unaccompanied by any decree committing the custody of the children to the mother. For when such a decree is made, then the father would have no right, either to take them into his custody, and support them, or employ any one else to do so, without the consent of the mother: *Hancock v. Merrick*, 10 Cush. 41; *Brow v. Brightman*, 136 Mass. 187; *Finch v. Finch*, 22 Conn. 411. Although it is held otherwise in some jurisdictions: *Holt v. Holt*, 42 Ark. 495, and other cases on plaintiff's brief.

But a decree of custody to the mother is predicated of its primarily belonging by right to the father, and the granting of it implies that such action on the part of the court is absolutely essential to imposing upon her the legal obligation of supporting their minor children. So long as the father lives, the mother, in the absence of any decree of custody in her behalf, cannot of right claim, as against him, their services, provided he is a suitable person to have the care of them. He may on *habeas corpus* obtain custody, as against their mother, on satisfying the court that he is a fit custodian: *Commonwealth v. Briggs*, 16 Pick. 203.

It would seem to follow that the divorce alone, while it dissolved the matrimonial relation between the parties thereto, did not affect in any wise the parental relation between them and their children. When the divorce was decreed in behalf of his wife, the defendant thereupon ceased to be her husband, but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him.

The cases which hold that in case of a decree for custody the father is not holden, impliedly hold that in the absence of any such decree he is liable: *Brown v. Brightman*, *supra*.

When the bond of matrimony was dissolved, these parties became as good as strangers; and the plaintiff may then maintain an action against the defendant for any cause of action which at least subsequently accrued: *Carlton v. Carlton*, 72 Me. 115; 39 Am. Rep. 307; *Webster v. Webster*, 58 Me. 139; 4 Am. Rep. 253.

We are of opinion, therefore, that this action is maintainable on the implied promise of the defendant resulting from the circumstances and the law applicable thereto.

Exceptions overruled.

FATHER IS LIABLE FOR SUPPORT of child after divorce granted: *Buckminster v. Buckminster*, 88 Am. Dec. 652, and note 659; *Pretzinger v. Pretzinger*, Sup. Ct. Ohio, Dec. 13, 1887.

LIABILITY OF FATHER FOR SUPPORT OF MINOR CHILD: Note to *Colebrook v. Stewartstown*, 64 Am. Dec. 279; *Bennett v. Gillette*, 74 Id. 779; *Freeman v. Robinson*, 20 Id. 399, and note. The mother is under no obligation to support her minor child, and is not entitled to his services: *Fairmount etc. R'y Co. v. Stutler*, 93 Id. 714.

ALLEN v. MAINE CENTRAL RAILROAD COMPANY.

[79 MAINE, 327.]

ANY NOTICE BY CONSIGNOR TO CARRIER to stop the goods in transit is sufficient; no particular form of notice is required.

CONSIGNOR EXERCISING RIGHT OF STOPPAGE IN TRANSITU must act in good faith toward the carrier, but if after giving notice to stop the goods, and furnishing reasonable evidence of the validity of his claim in due time by forwarding the invoice and his affidavit of ownership, the carrier refuses to stop the goods, he must respond in damages.

THE notice spoken of in the opinion was as follows, by telegraph: "Philadelphia, March 24, 1884. Stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside. W. F. Allen & Co." Afterwards the notice was repeated by letter, as follows: "To F't Agt. Maine Central R. R., Gray, Maine: Dear Sir,—We telegraphed you to stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside, we now write to confirm same, inclosed you will find a postal card, please make us an early reply, and oblige yours truly, W. F. Allen & Co."

Clarence Hale, for the plaintiff.

Drummond and Drummond, for defendants.

By Court, EMERY, J. The only mooted question in this case is, whether the plaintiffs effectually exercised against the carrier their clear right of stopping the goods *in transitu*.

The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company (the carrier) to stop and return the goods. The defendant company contend the notice was insufficient, because there was no statement of the nature or basis of the claim to have the goods stopped. While such a statement is probably usual, it does not seem necessary in this case. The carrier is presumed to know the law, and by such a notice as was given here is effectually apprised of a claim adverse to the consignee, as well as of a claim upon himself. In *Benjamin on Sales*, 1276, while it is said that the usual mode is a simple notice to the carrier, stating the vendor's claim, etc., it is also stated that "all that is required is some act or declaration of the vendor countermanding the delivery." *Brewer, J., in Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84, said: "A notice to the carrier to stop the goods is sufficient. No particular form of notice is required." In *Clemintson v. Grand Trunk R'y Co.*, 42 U. C. Q. B. 263, while it was held that the notice was faulty in not identifying the goods, it was said that a specification of the basis of the claim was not necessary.

The defendant further contends that the plaintiffs' omission to afterward prove to the carrier their right to stop the goods, when requested by the carrier to do so, has vacated their claim, and released the carrier from liability. But the carrier is not the tribunal to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove it to the court. The carrier cannot conclusively adjudicate upon his own obligations to either party. He is in the same position as is any man, against whom conflicting claims are made. If, as is alleged here, the circumstances are such that he cannot compel them to interplead, he must inquire for himself, and resist or yield at his peril.

It is reasonable, however, that the person assuming the right to stop goods in transit should act in good faith toward the carrier. He should, if requested, furnish him, in due

time with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable information as he may possess, such refusal might be construed as a waiver of his peculiar right, and might justify the carrier, after a reasonable time, in no longer detaining the goods from the consignee. But there was no such refusal here. The plaintiffs sent forward the invoice and their affidavit within a reasonable time.

The plaintiffs have now proved their right to stop the goods, and the defendant company, having denied that right without good reason, must respond in damages.

Judgment for plaintiffs for \$176.41, with interest from the date of the writ.

RIGHT OF STOPPAGE IN TRANSITU, HOW EXERCISED. — The vendor's right of stoppage continues, not only while the goods are being carried to the point of destination, but also until they have actually or constructively passed into the possession of the vendee. During such time, the right of stoppage may be exercised in almost any manner, as no particular form or mode seems to have been required in any case. Lord Hardwicke said, in *Snee v. Prescott*, 1 Atk. 250, that the vendor might get the goods back again by any means, so long as he did not steal them, and he would be free from blame. All that is required to make the stoppage effectual is demand or notice on behalf of the vendor in the assertion of his rights as paramount to those of the buyer or vendee: *Siffken v. Wray*, 6 East, 380. It is not necessary for the vendor to take actual possession by a manual seizure, but it is sufficient if he makes a claim for them adversely to the vendee during their transportation. All that is required is some act or declaration by the vendor countermanding the delivery of the goods. As was said in *Rucker v. Donovan*, 13 Kan. 255, 19 Am. Rep. 84, actual seizure of the goods before they come into the hands of the vendee is not necessary to the exercise of the right of stoppage *in transitu*. A demand of the carrier, or notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. See also *Walker v. Woodbridge*, Cooke's Bankruptcy Law, 402. The demand must be made of the carrier or middleman, in whose custody the goods are at the time, and under such circumstances that they may prevent their delivery to the vendee: *Mottram v. Heyer*, 5 Denio, 629. But such demand must be made of the one in possession of the goods: *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84. And a demand for the property on the vendee before its actual delivery to him, and while it is in the custody of custom-house officers, is not sufficient to enable the vendor to exercise the right of stoppage: *Mottram v. Heyer*, 5 Denio, 629.

A valid demand for the goods may be made by the agent of the vendor upon the captain of the vessel carrying the goods before they are unloaded, and if after such demand the captain delivers them to the assignee of the vendee, the vendor may maintain trover against the assignee: *Bohrling v. Inglis*, 3 East, 380. Nor is it necessary to a valid stoppage *in transitu* that the party by whom it is effected should have special authority to that effect; if he has the authority of a general agent, it is sufficient. So a merchant to whom the goods were sent, with directions to forward them, may effect the stoppage for the benefit of the vendor, provided the act is affirmed

by the latter: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Newhall v. Vargas*, 29 Id. 489; *Durgy etc. Co. v. O'Brien*, 123 Mass. 12; *Bell v. Moss*, 5 Whart. 189; *Reynolds v. Boston etc. R. R.*, 43 N. H. 579. But it seems, if the ratification of the agent's act comes after the goods have reached the vendee or his assignee, it comes too late, and the right of stoppage is lost: *Bird v. Brown*, 4 Ex. 786; *Davis v. McWhirter*, 40 U. C. Q. B. 598. A mere claim for the goods, though no actual possession be taken, is a sufficient exercise of the right of stoppage: *Mills v. Ball*, 2 Bos. & P. 457, cited approvingly in *Atkins v. Colby*, 20 N. H. 156. Of course, if the vendor takes actual possession of the goods during the transit, this is an effectual exercise of the right of stoppage: *Stanton v. Eager*, 16 Pick. 467. So if the goods, after being consigned, are lodged in the custom-house, because the duties on them are not paid, the vendor may exercise the right at any time before they are sold, and if the claim is seasonably made, and the goods are afterwards sold for duty, he is entitled to the proceeds of the sale: *Northey v. Field*, 2 Esp. 613.

The usual mode of exercising the right of stoppage *in transitu* is by simple notice to the carrier, in which the vendor's right is stated, forbidding delivery to the vendee, or requiring that the goods be held subject to the vendor's orders. In *Jones v. Earl*, 37 Cal. 630, it is said that no express demand on the carrier for the goods is necessary in order to charge him; all that is required is, that he be clearly informed that it is the desire of the vendor to retake the goods, and notice to this effect is sufficient. To the same effect, *Reynolds v. Boston etc. R. R.*, 43 N. H. 580; *Bell v. Moss*, 5 Whart. 189; *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84; *Bloomington etc. v. Memphis etc. R. R. Co.*, 6 Lea, 616. In such case, notice to the agent of the carrier, who is in possession of the goods in the regular course of his agency, is notice to the carrier: *Jones v. Earl*, *supra*. The notice, however, must be given to the one in possession of the goods: *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84. So that notice to the carrier, or to any one having charge of the goods during their transit, is sufficient, and does not prevent retaking the goods afterwards on account of a claim interposed by the vendee: *Newhall v. Vargas*, 29 Am. Dec. 489. The notice, to be effectual, must be given to the party having immediate possession of the goods, or to the principal whose servant has the custody, at such time, and under such circumstances, that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent delivery to the vendee or his assignee: *Whitehead v. Benbow*, 9 Mees. & W. 517. It has been held, however, that notice to the ship-owner imposes no duty on him to communicate it to the master of the ship, and that it is not effectual until communicated to the master: *Ex parte Falk*, 14 L. R. Ch. 446; affirmed, 7 L. R. App. C. 573. Notice to the carrier not to deliver the goods to the vendee is a sufficient exercise of the right of stoppage; and if the goods, by mistake of the carrier, are subsequently delivered to the vendee, the carrier is liable for their value: *Litt v. Cowley*, 7 Taunt. 169; 2 Marsh. 457. The notice must be specific enough to identify the goods, and must clearly state the object for which it is given, namely, a desire to stop the goods; if, in either event, it fails, it is insufficient: *Clementson v. Grand Trunk R. R. Co.*, 42 U. C. Q. B. 263; *Phelps, Stokes, & Co. v. Comber*, L. R. 26 Ch. 755; 29 Id. 813.

The vendor may effectually exercise the right of stoppage *in transitu* by giving notice to the ship-owner, when the latter has retained the bills of lading for unpaid freight: *Ex parte Watson*, L. R. 5 Ch. 35; 21 Moak's Eng. Rep. 764. And the vendor's notice to stop the goods makes it the duty of

the master of the vessel to refuse delivery to vendee to whom the bill of lading has been indorsed, and such notice is sufficient without representing that the bill of lading has not been assigned to the vendee. Under such notice, the vendor may demand redelivery to himself, and the carrier cannot retain the goods for delivery to the true owner after conflicting claims have been settled: *The Tigress*, 32 L. J. Adm. 97. The right of stoppage may be exercised by notice to the carrier after the goods have been stored in the railroad warehouse, and are there awaiting the payment of charges and delivery: *Symms v. Schotten*, 35 Kan. 310. So if the goods are in the customs warehouse, and the vendor gives notice to the carrier to stop them, after which the agent of the carrier gives an order for delivery to another upon payment of charges, the notice to the carrier is sufficient to stop them, though it might be advisable to also give notice to the customs officer. And if the goods are taken by the person holding the order, the company is liable for the delivery: *Ascher v. Grand Trunk R. R. Co.*, 36 U. C. Q. B. 609.

Where the vendee becomes insolvent during the transit of the goods, or after it has terminated, but before the goods have vested in his assignee, and the vendee has either rescinded the order of purchase or refused to accept the goods, the vendor may exercise the right of stoppage *in transitu* by making demand, or giving notice to that effect to the middleman, carrier, or custodian of the goods: Note to *Hause v. Judson*, 29 Am. Dec. 392; *Tufts v. Sylvester*, ante, p. 303; *Clark v. Lynch*, 4 Daly, 83; *Clark v. Bartlett*, 50 Wis. 543, 547; see also note to *Sangslaff v. Stix*, 60 Am. Rep. 51-57.

SEELE v. INHABITANTS OF DEERING.

[79 MAINE, 343.]

TOWN IS NOT LIABLE FOR NUISANCE when the acts complained of are not within the scope of its corporate powers, nor performed by its officers in the execution of any corporate duty imposed upon them.

TOWN INDEPENDENT OF STATUTE HAS NO CORPORATE POWER to dig ditches across another's land. Such act is *ultra vires*, and no liability is created on the part of the town when such acts are authorized and directed by a majority of the corporate officers.

Perry and Meaher, for the plaintiff.

N. and H. B. Cleaves, and Drummond and Drummond, for the defendants.

By Court, VIRGIN, J. Assuming, — what the demurrer admits, — the allegations in the declaration to be true, it is obvious that a most unmitigated nuisance has been created on and about the premises of the plaintiff to his great injury; and were the defendant an incorporated city, its alleged acts would constitute *prima facie* such a cause of action as might render it liable in the absence of any justification: *Cumberland etc. Co. v. Portland*, 62 Me. 505. But we have looked in vain

through both counts for any allegations which, in our view, render the defendant town liable for the alleged acts which have resulted so injuriously to the plaintiff's property.

The authority and liability of our *quasi* public corporations known as towns, as distinguished from municipal corporations incorporated under special charters, are generally only such as are defined and prescribed by general statutory provisions. Some things they may lawfully do, and others they have no authority for doing. To create a liability on the part of a town not connected with its private advantage, the act complained of must be within the scope of its corporate powers as defined by the statute. If the particular act relied on as the cause of action be wholly outside of the general powers conferred on towns, they can in no event be liable therefor, whether the performance of the act was expressly directed by a majority vote, or was subsequently ratified: *Morrison v. City of Lawrence*, 98 Mass. 219.

So a town is not liable for the unauthorized and illegal acts of its officers even when acting within the scope of their duties: *Brown v. Vinalhaven*, 65 Me. 402; 20 Am. Rep. 709; *Small v. Danville*, 51 Me. 359; but it may become so when the acts complained of were illegal but done under its direct authority previously conferred or subsequently ratified: *Woodcock v. Calais*, 66 Id. 234, and cases there cited.

The difficulty with the counts is, that the allegations therein do not bring the acts complained of within the scope of the corporate powers of the town, or aver that they were performed by its officers in the execution of any corporate duty imposed by law upon the town: *Anthony v. Adams*, 1 Met. 284. There is no intimation that the acts were done in connection with the making or repairing of any highway or townway which the law imposed upon the town, or in relation to any drain or sewer laid out or attempted to be laid out by the town authorities under the Revised Statutes, chapter 16, for which it might under certain circumstances become liable: *Estes v. China*, 56 Me. 407; *Franklin Wharf Co. v. Portland*, 67 Id. 46; 24 Am. Rep. 1; or in emptying a common sewer upon the property of the plaintiff outside of the public works, as in *Prop'rs L. & C. v. Lowell*, 7 Gray, 223. But the principal allegations are, that the defendants "wrongfully opened and dug a ditch across the main road . . . in Deering, and into an artificial ditch in the rear of a tripe and bone-boiling establishment from which a cesspool of stagnant and filthy water was then and there

collected, and then and there continued said ditch across the land of Samuel Jordan two hundred feet in the direction of the plaintiff's land. and out of the natural course of said water, and onto the plaintiff's land, and along through the same into his mill pond.

It is quite evident that a town, independent of any statutory authority, has no corporate power to dig ditches across another's land. Such an act is *ultra vires*; and any express majority vote, based on a proper article in a warrant calling a meeting of the defendants directing such acts, would create no liability on the part of the town: *Cushing v. Bedford*, 125 Mass. 526; *Lemon v. Newton*, 134 Id. 476.

Whether or not the declaration can be amended so as to make the town liable, we cannot in the absence of a knowledge of the facts now determine.

Exceptions overruled.

WALTON, J., did not sit.

LIABILITY OF MUNICIPAL CORPORATION for maintaining or abating a nuisance which is *ultra vires*: *Cavanagh v. Boston*, 52 Am. Rep. 716.

BRIGGS v. LEWISTON AND AUBURN HORSE R. R. Co.

[79 MAINE, 368.]

WHEN LAND HAS BEEN LAWFULLY TAKEN FOR STREET, legislative and municipal authority may authorize the construction and operation of a street railway upon it, no matter what the motor, without providing for additional compensation to the land-owner.

Savage and Oakes, for the plaintiff.

Dana and Estey, for the defendant.

By Court, EMERY, J. A strip of the plaintiff's land in Auburn had been lawfully taken by public authority for a public highway, and just compensation had been made to the owner therefor. The defendant company had subsequently constructed a street railroad (commonly called a "horse railroad") in this highway and over the strip of land thus taken from the plaintiff's land. Early in 1885, the company lowered the grade of their rails on this strip, whereupon the plaintiff brought this action, alleging said acts of the defendant company to be a trespass on her land.

All these acts of the defendant were within the limits of the

highway, and were done under express license from the city council of Auburn, and from the legislature. They would not therefore constitute any trespass on the plaintiff's land, if such license conferred lawful authority. The plaintiff contends, however, that the license invoked in this case has no validity and confers no authority, because it undertakes to make a new and different use of her land, without providing a just compensation therefor.

We do not think the construction and operation of a street railroad in a street is a new and different use of the land from its use as a highway. The modes of using a highway strictly as a highway are almost innumerable, and they vary and widen with the progress of the community. When a highway is first established in some unfrequented locality, it may exist for a time as a rude road, with a narrow track, and only occasionally used. With the growth of population and business, and the transformation of the lonely neighborhood into a thriving, increasing city, the highway may also go through the transformations of being turnpiked, planked, macadamized, and paved for its entire width. From bearing an occasional rude cart, it may come to sustain an endless succession of wagons, drays, coaches, omnibuses, and other vehicles of travel and traffic. There is a continual march of improvement in streets and in vehicles. It cannot be that the landowner must be compensated anew at each new improvement in street, or vehicle, or with every increase of traffic. All the land originally taken was taken for a highway, and for all time, if needed, and the compensation was estimated on that basis. The taking and the payment were once for all. The public, at the first taking, acquired an untrammelled right of way over every part of the land taken, with full right to do all things upon the land to facilitate its use as a highway, and make it sufficient at any time for the increasing need of the public for a highway. There is in such cases no stipulation limiting the public to any particular kind of road or vehicle.

The laying down rails in the street, and the running street-cars over them for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway. The weight of authority is so manifestly in favor of this proposition it is unnecessary to cite particular decisions.

Our attention is called to the fact that this defendant company is authorized to use steam as a motor on this same railroad, and we are cited to decisions of courts holding that the ordinary steam railroad companies must make additional compensation to land-owners before taking a street for their railroads. The argument is, that however it may be as to horse railroads, steam railroads must make compensation.

We do not think the motor is the criterion. It is rather the use of the street. If the railroad company exclusively occupy the land, — shut off the street from it, deprive it of its character of bearing the easement of a street, — use it, not for street traffic, but for what is known as railway traffic, the company may perhaps be said to make a new and different use of the land. But we have no occasion now to express any opinion on that question. This defendant company is using the land as a street. Its railroad is a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use.

If public authority can lawfully authorize the construction and operation of a street railway in a public street, without providing for additional compensation to the land-owner (as we think it can), it can also lawfully authorize a change of grade for that purpose, without committing a trespass upon the land-owner.

The officers of municipalities, charged with the duty of making the streets safe and convenient for the use of an increasing traffic, have large authority, and wide discretion in all matters of construction and improvement, including grades. It has been held that the lowering the grade of a street by a person acting under municipal authority and in good faith, without wantonness, is not a trespass against the land-owner: *Hovey v. Mayo*, 43 Me. 332. In this case the lowering of the grade was done under the authority of the city council and of the commissioner of streets. There is no suggestion of want of good faith.

We think the plaintiff is confined to the remedy provided by statute, section 16 of city charter of Auburn, and section 68, of chapter 18, of the Revised Statutes. These statute provisions will afford a remedy, if she be entitled to any compensation. She cannot maintain this action of trespass.

Judgment for defendant.

LAYING OF HORSE RAILROAD TRACK on street is not new servitude, so as to entitle owner along the street to additional compensation: *Note to Imkay v. Union Branch R. R. Co.*, 68 Am. Dec. 398; *Attorney-General v. Metropolitan R. R. Co.*, 28 Am. Rep. 264, and note 267; *Hinchman v. Paterson Horse R. R. Co.*, 86 Am. Dec. 252, and note 258; *Hiss v. Baltimore etc. R'y Co.*, 36 Am. Rep. 371; *Eichels v. Evansville etc. R'y Co.*, 41 Id. 561; *Carli v. Stillwater etc. R'y Co.*, 41 Id. 290

CASCO NATIONAL BANK v. SHAW.

[79 MAINE, 376.]

NOTICE OF DISHONOR OF NOTE is sufficient if addressed to the indorsers at their former place of business, where their affairs were being settled by a trustee to whom they had assigned for the benefit of their creditors.

NOTICE OF DISHONOR OF NOTE IS PROPERLY MAILED if dropped into a street letter-box put up by the post-office department. It is as truly mailed as if deposited in a letter-box within the post-office building.

IN ACTION BY HOLDER AGAINST INDORSER OF NOTE, the latter is not entitled to the benefit of payments made by a third party under an agreement with the holder that the note should be assigned to him. The money so paid is not a payment on the note.

REQUEST BY DEFENDANT TO CONTINUE ACTION until the termination of insolvency proceedings against him is discretionary with the court, and cannot be claimed as matter of right. It will only be granted when justice will thereby be promoted.

William L. Putman, for the plaintiff.

G. W. Morse, and N. and H. B. Cleaves, for the defendants.

By Court, WALTON, J. We think the defendants had due notice of the dishonor of the notes declared on. Notices were addressed to them at their former place of business, where their affairs were being settled up by a trustee, to whom they had made an assignment for the benefit of their creditors, and we have no doubt that the notices were received by the trustee. Notices so sent and received are sufficient: *Bank of America v. Shaw*, 142 Mass. 290; 2 N. E. Rep. 572. In the case cited, the notice was to the same firm, and under substantially the same circumstances as in the cases now before us, and the notice was held good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust."

It is objected that the notices were not properly mailed, because they were dropped into a street letter-box. We think this is not a valid objection. Street letter-boxes are authorized by an act of Congress (U. S. R. S., sec. 3868), and are as completely and as exclusively under the care and control of

the post-office department as boxes provided for the reception of letters within the post-office buildings themselves; and we think a letter deposited in a street letter-box which has been put up by the post-office department is as truly mailed, within the meaning of the law, as if it were deposited in a letter-box within the post-office building itself. It has been held that a delivery to a letter-carrier is sufficient: *Pearce v. Langfit*, 101 Pa. St. 507; 47 Am. Rep. 737.

Payments are claimed. Since the commencement of these actions, the bank has received \$44,398.17 from F. A. Wyman which the defendants claim should be credited to them. The credit cannot be allowed. The money was not delivered or received as payments on the notes in suit. It was received on a contract by which the bank agreed to assign to Wyman the notes in suit, and the actions thereon, "with all benefit of attachments, if any, made in said suits," and this contract has been assigned by Wyman to a third party. It is clear, therefore, that the defendants are not entitled to the benefit of these payments. So far as appears, they have neither a legal nor an equitable right to the benefit of them.

Payments to the amount of \$11,720.52 have been made by C. W. Clement and C. H. Ward on such of the notes in suit as are signed by them, which will of course be allowed, and the defendants will have the benefit of them.

The court is asked to continue these actions to await the result of insolvency proceedings which they aver are pending against them in this state. We are not satisfied that this request ought to be granted. The petitions have been pending since November, 1883, and yet no adjudication has been had upon them; and we doubt if there is any intention to prosecute them further; for the petitioning creditors appear to have been settled with and their claims assigned to the defendants' trustee, Wyman. Continuances for such a cause are discretionary with the court; they cannot be claimed as a matter of right; and they will only be granted when the court is satisfied that justice will be thereby promoted: *Schwartz v. Drinkwater*, 70 Me. 409. We are not satisfied that justice would be thereby promoted in these actions. The request is therefore denied.

Four actions between the same parties have been submitted to the law court upon one report of evidence; and the parties have agreed that the court shall render such judgment in each case as the legal rights of the parties may require. It is the

opinion of the court that the plaintiff is entitled to judgment in each of the four actions, and such judgments will accordingly be entered.

NOTICE OF DISHONOR LEFT AT INDORSEE'S former place of business is sufficient when: *Leviston Falls Bank v. Leonard*, 69 Am. Dec. 49.

NOTICE OF DISHONOR BY MAIL, SUFFICIENCY OF: *Wahworth v. Leaver*, 73 Am. Dec. 332, and note 334; *Walters v. Brown*, 74 Id. 556.

MOTION FOR CONTINUANCE IS MATTER OF DISCRETION with the court: *Shattuck v. Myers*, 74 Am. Dec. 236, and note 245; *Hyde v. State*, 67 Id. 640.

WORMELL v. MAINE CENTRAL RAILROAD COMPANY.

[79 MAINE, 397.]

TO ENTITLE SERVANT TO RECOVER FOR INJURY, he must prove negligence or omission of duty on the part of the master, occasioning the injury. If it was caused by his own neglect and want of ordinary care, or was the result of accident, he cannot recover. In such cases, negligence is never presumed against the master.

RELATION OF MASTER AND SERVANT, without neglect of duty, does not impose on the master a guaranty of the servant's safety, but that a servant of sufficient age and intelligence to understand the nature of the risks to which he is exposed undertakes, for compensation, the natural, ordinary, and apparent risks and perils incident to the employment.

RELATION OF MASTER AND SERVANT requires each to exercise ordinary and reasonable care; the master to use such care in providing and maintaining suitable means and instrumentalities with which to conduct his business that the servant exercising due care may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment.

MASTER IS NOT BOUND TO FURNISH SAFEST MACHINERY, instrumentalities, and appliances in carrying on his business; nor need he provide the best methods for their operation in order to insure responsibility from their use. But the servant, knowing the circumstances, must judge whether he will enter his service, or, having entered, will remain.

MASTER MUST NOTIFY SERVANT OF SPECIAL RISKS in the employment of which the latter is not cognizant, or which are not patent; and on failure of such notice, the servant exercising due care and receiving injury is entitled to recover, when the master knew, or ought to have known, of such risks.

SERVANT MUST PROVE BY EVIDENCE having legal weight that he was exercising due care at the time the injury was received, to entitle him to recover.

WHERE SERVANT RECEIVES INJURY, QUESTION OF DUE CARE on his part is ordinarily for the jury; but sometimes it becomes one of law, whether, from the facts and circumstances, the jury can properly find in favor of such care.

IF SERVANT, AT TIME OF RECEIVING INJURY, was not exercising due care, and was performing dangerous duties outside of his regular employment,
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he will be held to have assumed the risk incident thereto, and cannot recover, especially when he knew as well as the master the dangerous nature of the service in which he engaged.

Walton and Walton, and F. A. Waldron, for the plaintiff.

Baker, Baker, and Cornish, for the defendant.

By Court, FOSTER, J. The plaintiff was at work as a locomotive machinist in the car-shops of the defendant corporation at Waterville. On the day the injury was received he was directed by the foreman of the car-shops to go out with an engineer and move an engine from the paint-shop near by to the repair-shop where the plaintiff worked. The engine with which the moving was to be done was then standing on the turn-table in the machine-shop. In order to move the engine from the paint-shop to the repair-shop, it became necessary first to remove certain cars which were on the track in the yard. The plaintiff went out, and while waiting for the switches to be turned, Philbrick, the master mechanic of the road, came out and asked him if he knew how to shackle the passenger-car that stood upon the paint-shop tracks, and the plaintiff replied that he did not know how to shackle any cars. Thereupon the master mechanic took him to the car and explained the peculiar danger that might arise from the shackling of a passenger-car, no special instructions being given in relation to shackling flat-cars, but told him he must not get in line of the drawbars, and finally told him that he guessed he could get along by being careful. The flat-cars stood next to the engine and had to be coupled first. In attempting to couple the tender to the first flat-car, he made several efforts, but failed, as he claims, because the shackles were too short. Finally, when the engine and tender backed the third time, standing as he had stood before between the tender and the flat-car, with the tender on his right and the flat-car on his left, while adjusting the shackle with his right hand, he allowed the wrist of his left hand to rest over the edge of the deadwood of the flat-car directly over its drawbar, and directly in front of the buffer upon the tender, which is a projecting arm out of which the shackle extends, and failing to connect the shackle with the drawbar of the car, the buffer came back against and crushed his left hand, necessitating its amputation.

The plaintiff bases a recovery against the defendant corporation upon two grounds: that the implements and means

furnished were not proper and suitable for the work which the plaintiff was directed to do, and that Philbrick, representing the corporation as a vice-principal, placed him in a position of peculiar peril without notifying him of the danger.

The latter position is the one most strenuously urged and relied on by the plaintiff, who recovered a verdict against the defendant, and the case is now before this court on motion to set aside the verdict, and also on exceptions.

With the view which the court has taken of the case, it does not become necessary to determine in what capacity Philbrick was acting, whether as vice-principal or as a fellow-servant with the plaintiff, inasmuch as it is the opinion of the court that the verdict cannot be upheld upon other grounds.

The action set forth is founded upon the charge of negligence. It is the gist of the action. To entitle the plaintiff to recover, he must prove such negligence, the omission of some duty, or the commission of such negligent acts on the part of the defendant as occasioned the injury to the plaintiff.

If the injury was occasioned through his own neglect and want of ordinary care, or was the result of accident solely, the defendant being without fault, the action is not maintainable. "The negligence is the gist of the action, but the absence of negligence contributing to the injury on the part of the plaintiff is equally important": *Brown v. E. & N. A. R'y Co.*, 58 Me. 387; *Osborne v. Knox and Lincoln R. R.*, 68 Id. 51; 28 Am. Rep. 16.

There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant. In the long line of decisions, both in this country and in England, from *Priestley v. Fowler*, 3 Mees. & W. 1, to the present time, it has been held that the mere fact of the relationship of master to servant, without a neglect of duty, does not impose upon the master a guaranty of the servant's safety, but that the servant of sufficient age and intelligence to understand the nature of the risks to which he is exposed, engaging for compensation in the employment of the master, takes upon himself the natural, ordinary, and apparent risks and perils incident to such employment: *Coolbroth v. Maine Central R. R. Co.*, 77 Me. 167; *Nason v. West*, 78 Id. 257.

The relationship of master and servant may, and most frequently does, exist by simple mutual agreement that the ser-

vant is to labor in the service of the master. In such case the law holds that the terms of the contract are not fully expressed, and that there exists by implication reciprocal rights and obligations on the part of each which it will protect and enforce equally as if expressed by the parties. Among other things, it implies that each is to exercise ordinary and reasonable care. It implies that the master is to use ordinary care in providing and maintaining suitable means and instrumentalities with which to conduct the business in which the servant is engaged, so that the servant, being himself in the exercise of due care, may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment. The implied duty of the master in this respect is measured by the standard of ordinary care: *Hull v. Hall*, 78 Me. 117. The law holds him to no higher obligation than this.

Nor is the employer bound to furnish the safest machinery, instrumentalities, or appliances with which to carry on his business, nor to provide the best methods for their operation, in order to save himself from responsibility resulting from their use. If they are of an ordinary character and such as can with reasonable care be used without danger, except such as may be reasonably incident to the business, it is all that the law requires: *Pillsburgh etc. R. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 37 Am. Rep. 684.

Thus it has been held that where an injury happens to a servant while using an instrument, an engine, or a machine, in the course of his employment, the nature of which he is as much aware as his master, and in the use of which he receives an injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it as the cause of the injury, recover against his master, there being no evidence that the injury arose through the personal negligence of the master; and that it was no evidence of such personal negligence of the master that he had in use in his business an engine or machine less safe than some other in general use: *Dynen v. Leach*, 26 L. J., N. S., Ex. 221.

And in accordance with the same principle, it was held in *Indianapolis etc. R'y v. Flanigan*, 77 Ill. 365, that a railroad company was not liable for an injury received by an employee, while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed.

So in *Fort Wayne etc. R. R. v. Gildersleeve*, 33 Mich. 133, it was decided that a railroad company which used in one of its trains an old mail-car, which was lower than others, was not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height.

Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs; and the servant, having knowledge of the circumstances, must judge for himself whether he will enter his service, or having entered, whether he will remain: *Hayden v. Smithville*, 29 Conn. 548; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 121; 77 Am. Dec. 212; *Shanny v. Androscoggin Mills*, 66 Me. 427; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585; 3 Am. Rep. 506; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 413; 20 Am. Rep. 331.

Moreover, the law implies that where there are special risks in an employment, of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and on failure of such notice, if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew, or ought to have known, of such risks. It is unquestionably the duty of the master to communicate a danger of which he has knowledge, and the servant has not. But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom: *Lovejoy v. Boston and Lowell R. R. Co.*, 125 Mass. 82; 28 Am. Rep. 206; *Ladd v. New Bedford R. R. Co.*, *supra*; *Priestly v. Fowler*, *supra*. It is his duty to use ordinary care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part, as the master is to provide it for him. He may, by the want of ordinary care, so contribute to an injury sustained by himself as to destroy any right of action that might, under other circumstances, be available to him.

These rules are elementary and fundamental, and are everywhere recognized. They grow out of the necessities of

the relation of master and servant, and are founded and sustained by public policy. Though dressed in language differing somewhat in style of expression, it will be found that the decisions generally are in accord with the principles herein expressed. One writer has thus summed up the doctrine in the following language: "As we have seen it to be the duty of the master to point out such dangers as are not patent, so it is the duty of the employee to go about his work with his eyes open. He cannot wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work when there is danger. He must inform himself. This is the law everywhere": Beach on Contributory Negligence, sec. 138; *Russel v. Tillotson*, 140 Mass. 201.

In speaking of the respective duties and obligations between master and servant, in reference to dangers which are concealed and those which are obvious, the court, in *Cummings v. Collins*, 61 Mo. 523, say: "The defendants are not liable for any injury resulting from causes open to the observation of the plaintiff, and which it required no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which he had not contracted to render."

Upon a careful examination of the evidence in the case under consideration, we are satisfied that the verdict cannot stand. There is not sufficient evidence upon which a jury could properly found a verdict that the plaintiff himself was in the exercise of due care at the time he received his injury. This is an affirmative proposition which, in this state, and many of the others, it is incumbent on the plaintiff to make out by proof before he could be entitled to recover: *Dickey v. Maine Tel. Co.*, 43 Me. 492; *Lesan v. M. C. R. Co.*, 77 Id. 87; *State v. M. C. R. Co.*, 77 Id. 541; *Crafts v. Boston*, 109 Mass. 521; *Taylor v. Carew Mfg. Co.*, 140 Id. 151. Nor will this proposition be sustained, where the evidence in reference to it is too slight to be considered and acted on by a jury. It must be evidence having some legal weight. Such is the general doctrine of the decisions. A mere *scintilla* of evidence is not sufficient: *Connor v. Giles*, 76 Me. 134; *Riley v. Connecticut River R. R.*, 135 Mass. 292; *Corcoran v. Boston and Albany R. R.*, 133 Id. 509; *Nason v. West*, 78 Me. 256, and cases there cited; *Cornman v. Eastern Counties R'y Co.*, 4 Hurl. & N. 784.

It is not denied, as contended for by the learned counsel

for the plaintiff, that the question of due care is ordinarily one of fact for the jury. But the question oftentimes becomes one of law whether there are such facts or circumstances upon which the jury can properly base their determination in favor of such care. If not, it is within the province of the court, in the due administration of justice according to well-settled legal principles, to revise their findings.

And in this case the evidence, uncontradicted from the plaintiff himself, as to the manner of the accident, is conclusive against the verdict upon this point. Not only do the facts as detailed by him, and about which there appears to be no controversy, fail to show the exercise of due care, but rather that degree of carelessness and neglect on his part which must be held to have very largely, if not wholly, contributed to the injury complained of. He was a man forty-five years of age, and had been for many years familiar with engines of all constructions; had been a locomotive machinist for twelve years, repairing them constantly, and six years in the employ of the defendant corporation. For five years prior to the accident, engines with buffers had been in common use upon the road, and he had worked on every pattern of engine that came into the shops where he was employed. He testifies that the engine with which he was injured came that morning from the repair-shop where he was working, and that it might have been there four or five weeks, and he might have worked on it. He had received a general warning from Philbrick to be careful, and was specially warned of the danger in reference to shackling passenger-cars. It also appears from the testimony that he stood there watching the clearing of the tracks from fifteen to thirty minutes. He had full leisure to examine and inform himself of all the common dangers incident to shackling. It appears that he attempted three times to do the shackling, and the third time he received his injury. The first time he stood with the engine backing down upon his right, himself facing the engine and shackling apparatus on its rear, of which the buffer was the most prominent part. The shackle itself which he took hold of projected from the buffer, and he could not see one without seeing the other. Everything was in plain sight. It was in broad daylight. At the first attempt he failed to connect the shackle with the drawbar. Consequently the tender brought up against the deadwood of the car on his left. As the shackle did not connect, the contact between the tender and

the flat-car could only have been caused by the buffer striking against the deadwood of the car precisely in the spot where he afterwards placed his left hand and received his injury. He then tried a new shackle, repeating the same process. The second time the shackle failed to connect, and the engine and car came together again in precisely the same manner as at first, — the buffer again striking the car at the very point where afterwards he placed his hand. After these two attempts, immediately under his eye, he tried a third shackle, and the engine a third time backed down towards him, again giving him full opportunity for observation, he facing the buffer as before, and necessarily looking right into the shackling apparatus, of which the buffer was a part, and this time hung his left wrist over the front edge of the center of the deadwood, directly in front of the approaching buffer, in precisely the same place where the buffer had just struck the deadwood twice before. It was, as the evidence shows, the only place upon the car where he could not have placed his hand with perfect safety. Placing it where he did, the injury was inevitable. It required no special skill or training to know that such an act would necessarily result in injury. This was not an extraordinary or concealed danger which required to be specially pointed out to a person of mature years and ordinary intelligence. He had been employed, as he himself testifies, for twelve years solely in work about and upon all manner of engines and cars, including engines with buffers, precisely as this one was equipped. No man needs a printed placard to announce a yawning abyss when he stands before it in broad daylight: *Yeaton v. Boston and Lowell R. R.*, 135 Mass. 418; *Coolbroth v. Maine Central R. R. Co.*, 77 Me. 165; *Philadelphia etc. R. R. Co. v. Keenan*, 103 Pa. St. 124; *Osborne v. Knox and Lincoln R. R.*, 68 Me. 51; 28 Am. Rep. 16.

And it was held in *Wheeler v. Wason Mfg. Co.*, 135 Mass. 298, that where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover: Beach on Contributory Negligence, sec. 140.

Very similar were the facts in the case of *Hathaway v. Michigan Cent. R. R.*, 51 Mich. 253, 47 Am. Rep. 569, to these in the case before us. There, the plaintiff, an inexperienced brakeman, was called upon by the conductor in the night-time to couple two cars of the Erie road, which were made specially dangerous by having double deadwoods, which the plaintiff

had never seen before. In that case, as in the present, one of the real grounds set up by the plaintiff was, that he had not been sufficiently instructed in what was required of him by the company to enable him to discover and appreciate the danger, and that some notice thereof should have been given him by the company other than the general one which he received. The court say: "The plaintiff had the full opportunity of examining the one by which he stood some moments before the cars came together,—its size, shape, and the location of the drawbar were before him. He had only to look at it to be informed of any perils surrounding it. The moving car, at a distance of twenty feet, with its deadwood and drawbar in plain view, slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? He could see the deadwoods and drawbar thereon as well as if he had made the coupling of them a thousand times before. He could not fail to see if he looked at all": See also *Taylor v. Carew Mfg. Co.*, 140 Mass. 151.

If the plaintiff, as is contended, was at the time of this unfortunate occurrence in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties. This principle is settled by numerous decisions: *Woodley v. Metropolitan District R'y Co.*, 2 Ex. 389; *Railroad v. Fort*, 17 Wall. 553; *Rummell v. Dilworth*, 111 Pa. St. 343; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 121; 77 Am. Dec. 212; *Hayden v. Smithville*, 29 Conn. 548; *Wright v. New York Central R. R.*, 25 N. Y. 570; *Leary v. Boston and Albany R. R.*, 139 Mass. 587; 52 Am. Rep. 733.

In the last case cited, where the question is fully discussed, the court say: "Where one has assumed an employment, if an additional or more dangerous duty is added to his original labor, he may accept or refuse it. If he has an existing contract for the original service, he may refuse the additional and more dangerous service; and if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and while he may require the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience."

From the disposition of the case already made, it becomes unnecessary to consider the defendant's exceptions. The law

pertaining to the case, in order to cover it fully, at the time of the trial was necessarily somewhat complicated; and it is very questionable whether the numerous abstract propositions appearing in the charge, and following each other in quick succession, could be readily comprehended by a jury unaccustomed to grapple with abstruse and intricate legal propositions. While the charge may have been correct in the abstract, we are of the opinion that several of the defendant's requested instructions were proper to a full understanding of the principles involved, and their application to the questions at issue, and should have been given.

As the case is disposed of, however, on other grounds, nothing further need be said in relation to the exceptions.

Motion sustained. New trial granted.

SERVANT GUILTY OF CONTRIBUTORY NEGLIGENCE cannot recover damages for an injury: *Hugh v. New Orleans R. R. Co.*, 54 Am. Dec. 565, and note 573; *Bumell v. Laconia Mfg. Co.*, 77 Id. 212.

AS BETWEEN MASTER AND SERVANT, the latter assumes such risks as are incident to the service, and he is supposed to have contracted on those terms: *Noyes v. Smith*, 65 Am. Dec. 222, and note; *Illinois Central R. R. Co. v. Cox*, 71 Id. 298; *Snow v. Housatonic R. R. Co.*, 85 Id. 720.

DUTY OF MASTER TO FURNISH SAFE MACHINERY, materials, etc.: *Snow v. Housatonic R. R. Co.*, 85 Am. Dec. 720, and note 730; *Cowles v. Richmond etc. R. R. Co.*, 37 Am. Rep. 620; *Kelley v. Silver Spring Co.*, 34 Id. 615; *Gibson v. Pacific R. R. Co.*, 2 Id. 497.

DUTY OF MASTER TO NOTIFY SERVANT of dangers of his employment: *Baxter v. Roberts*, 13 Am. Rep. 160, and note 164; *Parkhurst v. Johnson*, 45 Id. 28; *Fones v. Phillips*, 43 Id. 264; *Williams v. Churchill*, 50 Id. 304.

LIABILITY OF MASTER TO SERVANT for work performed by the latter outside of his regular employment: *Leary v. Boston etc. R. R.*, 52 Am. Rep. 733, and note 737.

HAZELTINE v. BELFAST AND MOOSEHEAD RAILROAD COMPANY.

[79 MAINE, 411.]

BY-LAW OF CORPORATION MUST BE REGARDED AS CONTRACT between the corporation and its stockholders, when it states the conditions on which dividends are to be paid, as between preferred and unpreferred stock.

IN DECLARING DIVIDENDS ON PREFERRED STOCK, the arrearages of one year cannot be paid out of the earnings of a subsequent year, when the by-law of the corporation upon the subject implies that the entire net earnings of each year shall be paid out in dividends.

PROFITS GENERALLY MEAN the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account.

PROFITS FOR YEAR MEAN the surplus receipts after paying expenses, and restoring the capital to the position it was in on the first day of the year.

NET EARNINGS OF RAILROAD ARE GROSS RECEIPTS less the expenses of operating the road to earn such receipts. Among these expenses is included interest on debts.

RIGHTS OF PREFERRED STOCKHOLDERS ARE ENFORCEABLE against the corporation according to the terms of the contract made by them.

DIVIDENDS MAY BE PAID, although the corporation is not free from floating debt.

PREFERRED STOCKHOLDERS ARE ENTITLED TO DIVIDENDS from earnings on hand, without first making provision for the payment of the principal of the bonded debt, where the corporation is in good circumstances and credit, and could doubtless provide for an extension of the time for paying such debt, or make payment by the issue of other bonds.

EQUITY WILL COMPEL DIRECTORS OF CORPORATION TO DECLARE DIVIDEND in favor of holders of preferred stock, who are shown to be entitled thereto.

BILL in equity on behalf of the holders of preferred stock in the Belfast and Moosehead Railroad Company, to compel the declaring of a dividend in their favor.

William H. Folger, for the plaintiffs.

Drummond and Drummond, for the defendants.

By Court, **PETERS, C. J.** The facts of this case, and most of its questions, were before the court in the case of *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445. The preferred stockholders of the company are now complainants against the company and its directors, seeking to obtain through a court of equity dividends on their stock.

On March 20, 1886, when this bill was brought, the following facts existed: The road was, and since May 10, 1871, had been, leased to the Maine Central Railroad Company, the lease to run until May 10, 1921, the lessee to operate the road during the intervening period at its own risk and expense, to keep it in repair, and pay all taxes thereon, and pay a rent of \$36,000 per year.

The common stock amounts to \$380,400, and the preferred to \$267,700, all paid in, amounting at par value to \$648,100. The road cost \$1,050,000. The means expended for its construction, besides stock paid in, consisted of a bonded debt of \$150,000, a floating debt of \$150,000, and an indebtedness to the city of Belfast, the principal stockholder, of \$101,900 for borrowed money. The bonded debt is secured by mortgage on the road, the principal of which will mature May 15, 1890,

having existed in the same form since May 15, 1870, the interest thereon having been regularly paid semi-annually. It is the only debt existing against the company, nor is it pretended that any other can arise against the company from this time to the end of the lease in 1921. The company's expenses are trifling, being only such as are necessary to keep up a formal corporate organization. The floating debt had been wholly extinguished, the borrowed money paid, and there were in the treasury \$22,412.32 of cash assets, all from rents received under the lease, at the date of this complaint.

At that time the directors had laid aside out of money on hand nineteen thousand nine hundred dollars which, with future rents, might be available as a reserve fund wherewith to pay the bonded debt when it matures in 1890. But before this appropriation, which can easily be recalled, the complainants had used due diligence in the way of demands, notices, motions, and other movements to obtain from the directors a recognition of their equitable right to a dividend.

Three questions arise on the facts,—1. Are the preferred stockholders entitled to annual dividends, if earned? 2. At the date of the bill, had dividends been earned? 3. Is this a case authorizing the court to require the directors to declare a dividend?

While all of these questions were hardly before the court in the former case, to be directly adjudicated, still they were necessarily involved in it, and we then considered them carefully, hoping the parties would be satisfied with the results which were foreshadowed, without proceeding with further litigation. We then indicated that we were of the opinion that the preferred stockholders would be entitled to dividends after the floating debt became paid, and after considering the questions anew, we at this time see nothing to require us to change that opinion.

There can be no possible doubt that the obligation of the company to the privileged shares rests on by-law 18, and that the by-law establishes the terms of a contract between company and stockholders. We have already so decided.

The by-law runs thus: "Dividends on the preferred stock shall first be made semi-annually from the net earnings of the road, not exceeding six per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made on the non-preferred stock up to a like per cent per annum; and should a surplus then remain of net earnings, after

both of said dividends, in any one year, the same shall be divided *pro rata* on all the stock."

The construction which we gave to this contract in the previous case was certainly very liberal towards the holders of the common stock, and all the doubts were weighed in their behalf, in the decision that the preferred stock was non-cumulative. Had the by-law merely provided that the preferred shares should be entitled to a dividend of six per cent annually when earned, the arrearages of one year would have been payable out of the earnings of subsequent years, and there would have been no occasion for the present controversy between the two classes of stockholders. There is no question among the authorities on this point: Jones on Railways, sec. 620; Morawetz on Corporations, 2d ed., sec. 458; Cook on Stock and Stockholders, sec. 272. The latter author, in a note to section 269 of his work, published in 1887, cites *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445, *supra*, as inconsistent with the general rule, but states the ground for the variance: that inasmuch as the by-law implies that the entire net earnings of each year should be paid out in dividends, a deficiency or preferred dividend in any year could not be made up in subsequent years.

The next question is, whether the money on hand shall be regarded as net earnings out of which a preferred dividend should be paid; and the question has been discussed, secondarily, as to what extent future earnings under the lease will come under the same head. This point depends usually on several considerations, is a relative question,—not always susceptible of clear demonstration,—and is a matter to a considerable extent of good judgment in conducting the company's business, and of good faith in upholding its contracts on the part of directors.

All the cases in which an inquiry has arisen concerning the propriety or legality of paying preferred dividends, where the contract is to pay as often as annually, if there are annual earnings, concur in this, that the inquiry must be whether net profits have been earned in the particular year at the expiration of which dividends are demanded. The future wants and liabilities of the company may, no doubt, be taken into the calculation to a certain extent, as will be more fully explained hereafter.

We think that under any of the approved definitions of net

earnings, meaning such net earnings as are applicable to dividends, the complainants make out a case.

Certainly, in a literal view, there must be net earnings each year till 1890, if not up to the end of the lease. For the bills payable are \$9,000 per annum, a trifle only more, and bills receivable are \$36,000, leaving \$27,000 balance on hand each year. The preferred dividend would be \$16,062 per annum, leaving about \$11,000 in the treasury annually. This balance cannot now possibly be paid on any debt of the company. It is only claimed by the respondents that in the future it may be so used.

In *Hill v. Supervisors*, 4 Hill, 20, it is said: "Profits generally mean the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account." The case of *Dent v. London Tramway Co.*, L. R. 16 Ch. 344, strongly resembles the present case on this point. There, as here, the preference dividends were dependent upon the profits of the particular year only. Jessel, master of the rolls, says: "That means this, that the preferred share-holders only take a dividend if there are profits of the year sufficient to pay their dividend. They are co-adventurers for each particular year, and can only look to the profits of that year. If they are lost for that year, they are lost forever. Profits for the year mean the surplus receipts after paying expenses and restoring the capital to the position it was in on the first day of January of that year": *Elkins v. Camden and Atlantic R. R. Co.*, 36 N. J. Eq. 233, decided in 1882, presents questions similar to the present, and announces the rule that the preferred stockholders' "rights are to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year."

In *Morawetz on Corporations*, 2d ed., sec. 459, an approved work, the doctrine is stated: "The directors of a corporation have a discretionary power to withhold profits from the holders of common shares in order to accumulate a surplus, etc.; but it is the duty of the directors to pay the preferred share-holders their promised or guaranteed dividends, whenever the company has acquired funds which may rightfully be used for the payment of dividends. This rule applies with peculiar strictness where the preferred share-holders are entitled to receive their dividends annually out of profits earned during the current year only, and a deficit in any year does not become payable out of subsequent profits."

But apply to the question the definition of net profits which would be regarded as the most liberal to the company, or the holders of the common stock; allow that there must be net profits such as should be applied to dividends; and that funds may be kept on hand sufficient to make reasonable provision for both the present and future necessities of the company. A very much quoted definition, as applicable to railroad corporations, is that formulated by Mr. Justice Blatchford in *St. John v. Erie R. R. Co.*, 10 Blatchf. 271: "Net earnings are, properly, the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the share-holders to go toward dividends which in that way are paid out of the net earnings." This definition was substantially repeated in *Warren v. King*, 108 U. S. 389, Mr. Justice Blatchford, upon another bench, delivering the opinion, and asserting that "while the rights of a preferred stockholder are not to be superior to the rights of creditors, they are nevertheless enforceable against the company according to the terms of the contract made by them." We refer to the views to which we committed ourselves upon this branch of the case in *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 452, before cited.

It will be noticed that the definition of net profits, in the case of railroad corporations, which are generally more heavily in debt than other kinds of business corporations, calls for the payment of interest on the company debt, but not necessarily for payment of any portion of the principal. At this point the parties come to a closer issue and really to the turning-point of the controversy; and that is, whether the bonded debt of one hundred and fifty thousand dollars, due in 1890, must be first wholly paid before any declaration of dividends. The respondents so contend. The complainants contend that, in ascertaining net profits, a portion only of the earnings should be reserved for the payment of the debt, and that the debt, or some portion of it, when it comes due, should be extended in some form.

The authorities on the subject of ascertaining what are the annual net profits or earnings of a railroad corporation, perhaps without exception, make a distinction between the payment of its floating debt and the payment of its permanent or

bonded debt,—between ordinary and extraordinary indebtedness. It is not indispensable, however, that the company be free from the pressure of floating debt before it may lawfully pay dividends even to holders of its non-preferred stock. It may, even under some circumstances, borrow money to pay dividends: Morawetz on Corporations, 2d ed., sec. 438, and cases.

In many cases there is difficulty in ascertaining what the actual condition of a company may be. None exists here. There could not well be an instance of less complicated affairs. The business of the company is guaranteed, its amount of income fixed, its expenses are nominal, and its freedom from all the liabilities and risks usually incident to the management of a railroad is assured for the next thirty-three years.

In every sense this last debt of one hundred and fifty thousand dollars is a permanent debt. It is a bonded, mortgage, and interest-bearing debt. The lease secures it many times over. The road itself is an absolute security for it, and undeniably for much more. It is a permanent debt for another reason. It entered into the construction of the road, and is represented in its permanent property. A distinction between expenses for construction and ordinary expenses is maintained in the leading cases on this subject. The argument is, that capital paid in and capital borrowed unitedly produced the earnings, and that a proportionate share of the earnings should be accorded to each: *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 453. In that view the bonded debt earns but nine thousand dollars per annum of the thirty-six thousand dollars earned in all.

It will be readily seen that there are special reasons for deeming the complainants' claim equitable. They have been required to remain in waiting for dividends for many years, in order that a large amount of the company's indebtedness, say two hundred and fifty thousand dollars, should be first paid, quite an exacting construction against them being required to produce such result. The company or its common share-holders would have suffered no injustice had the debt to the city of Belfast been placed in a permanent funded form. Another thing, before spoken of, which favors the complainants is, that by our former opinion their dividends were held to be non-cumulative, and if lost now are forever lost. Still another thing may be of importance enough to be taken into account, and that is that the corporation is paying six per

cent interest on its bonds, and receives about one third interest on the sums which it proposes to keep on hand.

The respondents go further than to deny that net profits have been or will be earned; they contend that they should not be divided even if they have been earned. Of course all the net earnings of an indebted company should not always be devoted to dividends. We think a company should have a right to base its calculations upon a final payment of its debts at some time. But steps in that direction are not to be untimely, or oppressive to other interests, and should be such as not to unreasonably interfere with the expectations or interests of stockholders, and such as will not prevent a reasonable performance of all other obligations which have been assumed by the company. The more practical question is as to how far the earnings shall be reserved, and how far divided. But it comes round to the primary question, which is, Have net profits been earned, such as are reasonably applicable to dividends? The argument of the learned counsel for the respondents seems to proceed upon the idea that the complainants have a prior right to receive dividends only whenever they have been actually declared, but that the company has the right to refuse to declare dividends, whether they have been earned or not. Such is not the letter or spirit of the contract entered into. The promise of the company was, that dividends semi-annually from net earnings "shall be made."

But when the present mortgage debt of one hundred and fifty thousand dollars was established, it was to be paid in twenty years, and shall it not be paid at the end of that time, asks counsel. It may have been supposed that twenty years would be long enough for the debt to run without a renewal. But if it was even supposed that the debt could be conveniently paid at maturity without renewal, was it not calculated by the parties that dividends would be, in the mean time, distributed to the preferred stockholders? The result only proves a miscalculation by the company of its ability to literally perform its obligations. Is it an excuse for not declaring dividends out of net earnings, provided there are net earnings, merely that a company cannot pay an entire bonded debt at maturity without creating a new debt or borrowing again? Is it not reasonable to require the company to keep all its obligations, when they can easily do so? If the company had no means or credit which would enable them to place a new obligation on the market there would be force in

the position. But no such inability is, or possibly can be, pretended. Can it be said that a railroad company makes no net profits in a year in which it gains thirty-six thousand dollars, and has only nine thousand dollars to pay out, because it owes one hundred and fifty thousand dollars, payable in four years, abundantly secured upon its property, when the company has a perfect credit, and abundant means to enable it to replace the old with a new loan on advantageous terms? Does a merchant who carries on business partly on borrowed capital earn no profits in a year, at the end of which, besides retaining his capital, he has received twenty-seven thousand dollars more than all he has paid out, simply because he owes a debt for his borrowed capital, which he has abundant ability to pay, but not without further borrowing? Says Morawetz, Corporations, sec. 439: "In ascertaining whether a company has a surplus which may be divided among the share-holders, permanent improvements made by means of borrowed money may often be valued as counterbalancing the liability of the company for the money used to construct them."

Two cases are relied on for the respondents, neither of which appears to us as having any tendency to support their general position. One is *Karnes v. Rochester R'y Co.*, 4 Abb. Pr., N. S., 107. That case shows that two sets of railroad directors were chosen, and a controversy was going on between them as to which was the legitimate board. Pending that litigation, a common share-holder—there was no preferred stock—brought a bill to have all the moneyed assets of the corporation distributed among the stockholders. There were thirty-six thousand dollars in government bonds on hand, the debt was seventy thousand dollars, due in seventeen years, the annual expenses were about ten thousand dollars, and the bill, which was demurred to, did not allege whether there was any annual balance of profits or not. The court, amongst other grounds of decision, said that no breach of any obligation on the part of the company to the stockholders, nor any omission of duty, was alleged; that the acts of directors should not be interfered with by courts, except to prevent injustice; that the corporation could make no dividends, and the directors were not a party to the bill; that there was nothing to indicate that the money on hand was not needful for the security of the creditors of the company; that it was not even alleged that the directors had refused to make a dividend, nor stated

that one, in justice, ought to be made; and the bill was dismissed.

The other case is *New York etc. R. R. Co. v. Nichols*, lately determined in the supreme court of the United States, reported in 15 Fed. Rep. 575. The case was first decided in the circuit court, 21 Blatchf. 177, where it was held that the company could not, against the interests of preferred stockholders, divert a large quantity of funds from them to other uses of the company. The decree was reversed in the upper court, not for any difference between the two tribunals as to the law of the case, as stated by the judge below, but upon a difference of opinion in making an application of the law to the facts. The points of the case are correctly represented by the head-notes, which are as follows: "The holder of preferred stock is not entitled absolutely to a dividend, even if there be 'net earnings' from which such dividend might be paid. The directors may use the 'net earnings' for the improvement of the road, where such improvement is shown to be imperatively necessary to the preservation of the corporate property and the continuance of the corporate business." The court were deeply impressed with the uncontradicted testimony of the president of the company, that "but for using the funds in question in that case, the company could not have paid its fixed charges, but would have again gone into bankruptcy, and the entire interest of the stockholders been destroyed." That is unquestionable doctrine. Preferred stockholders are not to be protected to the extent of endangering the rights of creditors, or of wrecking or crippling the enterprise of the road: Clark on Stockholders, sec. 271; *Culver v. Reno etc. Co.*, 91 Pa. St. 367.

The condition of the railroad above alluded to, the Erie system, illustrates the fallacy of the claim that all the earnings of a railroad corporation should be withheld from stockholders until its debts are paid. That company has a capital of over seventy-seven million of common and preferred stock, and an indebtedness exceeding one hundred million of dollars, secured and unsecured. The court need not have troubled itself over the difficulties presented in that case, if it had had the courage to assume that the preferred stockholders were not entitled to dividends until the one hundred million dollars of debt were paid. There is hardly a railroad company in the world that has not a funded debt. Such a rule would work an injustice amounting to cruelty in many cases. Section 100,

chapter 42, of the Revised Statutes provides that savings banks may invest their deposits in the stocks of any dividend paying railroad in New England. How would the rule contended for work with savings bank deposits invested in Maine Central railroad stock, a company having three million six hundred thousand dollars stock and eleven million dollars of indebtedness; or in the Boston and Maine, with a debt of seven million dollars; or in the Boston and Albany, with a debt of ten million dollars; or, if we look out of New England, in the Chicago, Burlington, and Quincy Railroad Company, one of the most reputable companies in our country, having more than eighty million dollars of funded indebtedness? What would annuities and life estates be practically worth to the holders of them in railroad companies, under a rule which allowed no dividends until all debts are paid. The history of railroad enterprises teaches us that the old liabilities of companies are well-nigh habitually paid by the creation of new ones, the general design being to lessen the liabilities, which are represented in the construction, by gradual processes.

The last point which the case presents is, whether the court can interfere in behalf of the complainants. We think it can and should. The directors refuse to perform a duty. They ignore a contract. They are chosen by the holders of the common stock, who are the majority, and are hostile to the interest of the complainants. We asserted the right of the court in the former case, and there cited authorities in support of it. Says Morawetz, Corporations, sec. 280: "Where certain shareholders are entitled to privileges which do not belong to the other members of the company, the court will provide a remedy for an infringement of these privileges by the other shareholders of the company's agents": See Cook on Stock and Stockholders, sec. 541, and cases. Says Wheeler, J., in *Lake Erie etc. R. R. Co. v. Nickals*, *supra*: "When it comes to the question of using the profits which would go to one set of stockholders for the benefit of another set, a more rigid rule should be upheld. The question becomes more one of right to be determined by the law, than one of policy to be determined by the discretion of the directors." When the resolution of directors makes an alteration in the priorities and payments provided in the memorandum of association, it is beyond their power, and may be interfered with by the court: *Ashbury v. Watson*, L. R. 30 Ch. 376. Even an action at law was allowed on a con-

tract to make a dividend of earnings: *Bates v. Railroad Co.*, 49 Me. 491.

But has the court the power, asks the learned counsel, to prevent a company paying its debt when it becomes due? Not at all. On the contrary, the court would compel the company to pay its debts to the letter. It will also exercise its power in a legitimate case to require the company to keep its other obligations, legal or equitable. While the company does not owe a debt to the preferred share-holders, it does owe them an obligation, founded upon a contract which is as sacred as any other contract. If the company had not sufficient means or credit with which to pay its debts without applying upon them the funds in question, the funds should be so used. But no creditor makes opposition to complainant's claim, nor have they any occasion to. The creditors must be protected, and so must the different classes of stockholders, according to their respective rights. If the preferred stock is in the way of an earlier enjoyment of dividends by the holders of the common stock than otherwise would have been, it is an impediment of the company's own creation. The contract to pay dividends on preferred stock was upon the sole condition that net earnings are possessed by the company. New conditions cannot be imposed by the company alone. Good faith forbids it.

Finally, what shall the decree be? The complainants, admitting that the mortgage debt should be paid within some reasonable time, which must from necessity be somewhat arbitrarily fixed, and adopting the scheme suggested by the court in the former case, ask that a decree be passed allowing dividends for the present and the future for such an amount semi-annually as will not deprive the company of an opportunity of extinguishing its debt within the life of the lease, if it desires to, and of paying dividends to the preferred stockholders during the same period. That would require a calculation which a master, and not the court, should make, and we are inclined to the view that such an extensive decree may not be expedient, all things considered, at the present juncture. The future action of the company may make such a comprehensive proceeding avoidable.

The limited and more direct inquiry is, whether on January 1, 1886, the company should have declared a dividend on the preferred stock, requiring therefor the payment of \$16,062. We think, as between itself and that class of stockholders, it was possessed of net earnings enough, which by its agreement

it had pledged for that purpose. It had \$22,412.32 in its treasury; it received \$18,000 in addition on May 10, 1886; it had nothing to pay until a half-year's interest, \$4,500, became due on May 15, 1886.

Bill sustained with costs. Decree according to the opinion.

WITH RESPECT TO ASCERTAINING PROFITS OF RAILROAD CORPORATION, the following rule, formulated by the master of the rolls, appears to be in harmony with the principal case: "I am of opinion that all the debts of the company are first payable, other than those which, for want of a better expression, may be called funded debts; for instance, if the defendants have raised money by mortgage, under the powers contained in their act, for the purpose of completing their line, this does not constitute such a debt as can be paid off out of the profits before the profits are divided. But, on the other hand, any debts which have been incurred, and which are due from the directors of the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose, — these are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid": *Corry v. Londonderry and Enniskillen R'y Co.*, 29 Beav. 272.

WOODMAN v. PITMAN.

[79 MAINE, 456.]

RIGHTS OF TRAVELING UPON OR OF HARVESTING ICE upon a navigable river are not absolute in any person, but are public rights, which belong to the whole community; their enjoyment depends very much upon first appropriation, as one man's possession may exclude others.

RIGHT TO TRAVEL UPON AND TO HARVEST ICE on navigable rivers are relative or comparative. Each must be exercised reasonably, depending upon the importance of the different rights in different localities, and the benefits which the community derive therefrom.

LEGISLATURE HAS CONSTITUTIONAL AUTHORITY to provide rules regulating the possession and cultivation of ice upon navigable rivers, where the tide ebbs and flows, at least so far as the business is carried on below low-water mark, and it may provide for the adjustment of conflicting interests which may affect that privilege.

IN ABSENCE OF STATUTE, JUDICIAL AUTHORITY may determine the manner in which the privileges of the possession and cultivation of ice on navigable rivers may be best enjoyed by the public, provided no violence is done to existing law.

PRIVILEGE OF HARVESTING ICE on the Penobscot River at Bangor, and for some distance below, is incomparably greater than that of traveling on the ice, and the latter privilege cannot be set up to prevent or abridge the former to any extent whatever.

RIGHT OF TRAVEL ON ICE on navigable rivers in all places is generally inferior to the right of navigation. Whether it can ever become a superior right depends upon circumstances.

HARVESTING ICE ON NAVIGABLE RIVERS becomes a nuisance only when actual injury is sustained by the public, and an unlawful obstruction to navigation is caused thereby.

ICE-FIELDS ON NAVIGABLE RIVERS, after being staked, fenced, and scraped, and, in some instances, connecting fields extending across the river, are so far the property of the appropriator that an action will lie against one who disturbs his right.

APPROPRIATORS OF ICE ON NAVIGABLE RIVERS should by suitable means reasonably guard their fields from danger to persons who may be likely to innocently intrude upon them. But the former are not liable for the negligence of the latter, to which they do not contribute.

THOUGH APPROPRIATOR OF ICE on navigable river may have left his field unprotected from danger to a traveler, still he is not liable for an injury caused by the traveler's negligence and want of exercise of ordinary care.

Charles P. Stetson, for the plaintiff.

Wilson and Woodward, for the defendants.

By Court, PETERS, C. J. This case largely depends for its solution upon what may be the extent of the right to harvest ice from our large rivers, compared with the conflicting right of traveling upon such rivers during the winter season. This is an interesting topic of inquiry, in view of the importance which ice has lately assumed as a merchantable commodity, and is a branch upon which the law has as yet hardly passed beyond a formative period. The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions, which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it, not by subverting, but by forming new combinations and making new applications out of its already established principles, the result produced being only "the new corn that cometh out of the old fields."

Neither of the rights which seem in conflict in the present case—that of harvesting ice and that of traveling upon the ice—is absolute in any person. No one has any absolute property in either. They are derived from a natural right, which all have, to enjoy the benefit of the elements, such as air, light, and water, and are common or public rights, which belong to the whole community. In the Roman law, they were classified as "imperfect rights." Not that all persons can or do enjoy the boon alike. Much depends upon first appropriation. One man's possession may exclude others from it. Says Blackstone, 2 Com. 14: "These things, so long as they remain in possession, every man has a right to

enjoy, without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards." They are the subjects of qualified property by occupation: 2 Kent's Com. 348.

Each right is, in theory, speaking generally, relative or comparative. Each recognizes other rights that may come in its way. Each must be exercised reasonably. And what would be a reasonable exercise of the one or the other at any particular place—for clearly there would be a difference in the relative importance of the different rights in different localities—depends in a large degree upon the benefits which the community derive therefrom. The public wants and necessities are to be considered. The two kinds of franchises belong to the people at large, are owned in common, and the common good of all must have a decisive weight on the question of individual enjoyment.

These and all other public rights, and the relation that shall subsist between them, when not thereby trenching upon congressional jurisdiction, may be regulated by the legislature. The legislature is the trustee of the public rights for the people. And as such agent or trustee, the legislature of this state has gone a great way in abridging an individual enjoyment of some of the common rights and privileges possessed by society, when the legislation has presumably inured to the common good. It authorized the changing of the channel of Saco River, although the effect of the diversion was to impair the value of a good deal of private property: *Spring v. Russell*, 7 Me. 273; has allowed private interests to be subserved to the injury of other private interests, by permitting dams and mills to be erected which prevented the flow and ebb of the tide, upon the ground that the public, as a whole, were to be benefited thereby: *Parker v. Cutler Milldam Co.*, 20 Id. 353; 37 Am. Dec. 56; has granted to a single individual the exclusive right of navigating Penobscot River above the tide with steamers for a period of twenty years, for the consideration of improvements to be made in the navigation of the river by the grantee: *Moor v. Veazie*, 31 Me. 360; 32 Id. 343; 14 How. 568; 52 Am. Dec. 655. These are illustrations of the legislative power in such matters.

The legislature has the constitutional authority, no doubt, to provide rules regulating the possession and cultivation of the ice-fields upon our navigable rivers, where the tide ebbs

and flows; at all events, so far as the business is carried on below low-water line, and for the adjustment of conflicting interests which may affect that privilege. If it omits to do so, such matters necessarily become the subjects of judicial interpretation. While the judicial is not co-extensive with the legislative jurisdiction upon the questions, there can be no doubt that it is within the scope of judicial authority to determine the manner in which such public privileges may be best enjoyed by the public, provided that any judicial regulation which may be attempted shall do no violence to existing law.

The law is subject to slow and gradual growth. A remarkable instance of the development of the law is seen in the doctrine unanimously adopted by the courts in this country, that a river may be considered navigable, although not affected by a flow of the tides from the sea. The common law was otherwise. Lord Hale, the great publicist, knew no such doctrine. Legislation did not create it. The courts felt obliged to adopt the interpretation, as a new application of an old rule, from an irresistible public necessity. The court of no state has probably ventured so far as this court has, in maintaining that small streams have floatable properties belonging to the public use. Our climate and forests, together with the interests and wants of the community, make the doctrine here reasonable, — a reasonable interpretation of the law; while in some of the states, where less necessity for the doctrine exists, it is considered by their courts to be untenable as subversive of private rights. So in handling the somewhat novel and important questions now pending before us, we are certainly at liberty to construct out of admitted legal principles such reasonable rules as will meet the requirements of the case.

The importance to the public of the ice privileges within the territory before named is incomparably greater than is that of traveling on the ice. Winter river-roads are of much less consequence at the present day than formerly. In the earlier days, the natural ways were the only ways for travel, and upon the large ponds and lakes and upon the rivers in remote places, the same necessity may even now exist. But at Bangor, and for some distance below, the principal area of Penobscot River from which the ice cuttings have been for some years customarily taken, the public have no need of a way on the ice. The traveler receives much more than an equivalent for any deprivation of the natural passage, in the

use of the roads on the banks of the river, at all times kept passable at the public expense. Roads over the ice are rarely suitable and passable,—only occasionally so. The access to them from the shores is difficult if not dangerous, where the tide, as it does here, ebbs and flows. Permission must be had of the riparian proprietor to cross his land, to enable one to get to the river without being a trespasser. The inconveniences render the privilege nearly, if not quite, worthless. Nor is any considerable use of the river for such purpose proved or suggested.

On the other hand, the business of gathering ice for merchantable purposes has assumed extraordinary importance on our rivers. Large amounts of capital are invested; thousands of men and of teams are employed at a season of the year when other employment cannot be obtained by them; the outlay is mostly in bills for labor, widely circulated; a crop of immense value is annually produced from an exhaustless soil without sowing; the shipping business is materially aided by it; the wealth of the state is greatly increased by it; it is eminently a business of the people. It would seem unreasonable to embarrass such an important enterprise by according to the traveling public a paramount right of passage, when such right, even to its possessor, is scarcely good for anything.

It is an error, we think, to invest the right of passing on the ice in all places with the same degree of importance as that which attaches to the right of vessels in navigable waters. It may be an offshoot of the navigable right,—something akin to it,—but a right of a secondary or inferior degree. The idea of roads over the frozen surface of rivers was never broached in the old common law,—it has grown up since,—and should be the superior right or not, according to circumstances. We know of only one judicial decision touching the subject, that in our own state, *French v. Camp*, 18 Me. 433; 36 Am. Dec. 728; and that does not contradict the views we express in this discussion. There the plaintiff's injury came from the defendant's carelessness in cutting a hole through the ice, and leaving it exposed upon or near a place where there had been a winter road for more than twenty years. Weston, C. J., there says: "Assuming that the defendant has as good a right to the use of the water as the plaintiff or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail them-

selves of it." In the present case, it must be remembered, the defendants are not defending themselves as riparian owners, for that would justify their possession only to low-water line, but as a portion of the public, partaking of a common and public right: *Brastow v. Rockport Ice Co.*, 77 Me. 100.

An unlawful obstruction to navigation, being a common nuisance, is remedial by indictment or by abatement; or a court of equity may take jurisdiction upon an information filed by an attorney-general: Gould on Waters, sec. 121. It would seem strange to see the ice harvesters accused of nuisance. But nuisance exists in lawful business only where actual injury is sustained. It must be some essential injury and damage. "People living in cities and large towns must submit to some annoyance, to some inconvenience, to some injury and damage; must even yield a portion of their rights to the necessities of business": Wood on Nuisance, 11. In an English case, it was said: "Where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions for every petty annoyance": *St. Helens Smelting Co. v. Tipping*, 11 Jur. 785, reported in 116 Eng. Com. L. 1093. In *Rhoades v. Otis*, 33 Ala. 578, 73 Am. Dec. 439, a much-quoted case, the test of the floatability of a stream was held to be, whether fit for valuable floatage and useful to important public interests. In *Wethersfield v. Humphrey*, 20 Conn. 218, it was held that, in order to make a stream navigable, "there must be some commerce and navigation upon it which is essentially valuable": *Wethersfield v. Humphrey*, 22 Id. 198. Navigators must endure inconveniences for the greater general good: *Brown v. Town of Preston*, 38 Id. 219. To constitute nuisance, the obstructions must materially interrupt general navigation: *State v. Wilson*, 42 Me. 9. In *Rowe v. Granite Bridge Co.*, 21 Pick. 344, 347, Shaw, C. J., said: "But in order to have this character, it must be navigable to some purpose useful to trade or agriculture." In *Attorney-General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380, it is said that this language is applied to the capacity of the stream rather than to its uses. But the last was a case where the officers of the commonwealth were endeavoring to prevent an act supposed to injuriously affect the harbor of Boston.

It is our opinion that any occupation of the Penobscot River, within the limits now receiving our attention, for the purpose of a winter way, would be, at this day, of such insig-

nificant importance, so useless and valueless in comparison with other public interests, that it cannot be set up to prevent or abridge the taking of ice within those limits to any extent whatever.

We do not, however, apply the rule stated to any place where a way is commonly used across the river, connecting town or county roads, or where a ferry is established by law: R. S., c. 20, sec. 7.

The traveler's right, even if existing theoretically, does not under the circumstances assert itself. Reasonable use is practically no use. The same public, possessing both rights, prefer to abandon the use of the one for the much more valuable use of the other.

We are aware that the law, in facilitating the enjoyment of public rights,—and no private right is involved in this controversy,—scans closely the grounds upon which it admits the advantage of one person to be set off against the disadvantage of another. In an early English case, *Rex v. Russell*, 6 Barn. & C. 566, an extreme rule was promulgated, in later cases not fully assented to, that staiths erected in the river Tyne should not be regarded as a public nuisance, if the public benefit produced by them countervailed the prejudice done to individuals,—the supposed public benefit being that, in consequence of the erections, coals would be brought to the London market in better condition or for lesser price. In subsequent cases it has been maintained that the benefit to be derived from tolerating any impairment of the navigable convenience must be direct, and that the staiths in the Tyne were a remote and indirect benefit merely, and not computable as a public benefit in the sense of the term in which it should be used when considering the question of nuisance; and it has been explained that the benefit must be a public benefit to the same public; that the same public, or some part of the public which suffers the inconvenience, must also receive the benefit; that it must be both beneficial and injurious to the public using the same waters.

A satisfactory explanation of the doctrine appears in a discussion by Hessel, master of the rolls, in *Attorney-General v. Terry*, L. R. 9 Ch. 423, where he says: "Then it may be asked, What is a public benefit? In my view, it is a benefit of a similar nature, showing that on a balance of convenience and inconvenience the public at that place not only lose nothing, but *gain something* by the erection." In that case, it was decided

that any benefit in the way of gaining trade to a single individual erecting a wharf in navigable waters was too remote to be held to be for the advantage of the public generally, when the channel intruded upon was so narrow that every foot of it was wanted for navigation. In the opinion, an illustration of public benefit is given, by supposing the piers of a bridge to be placed in the middle of a navigable river, thereby, "to some extent, to a more or less material extent, obstructing the navigation," but the necessity is great and the injury trifling. In that case, says the opinion, "it would be a benefit that would counter-balance the public injury."

Applying the doctrine as carefully as it is guarded in the cases most widely differing from the case of *Rex v. Russell*, above cited, we feel assured that our conclusions are correct in sustaining the contention of the present defendants. Here, the ice-gatherer and the traveler belong to the same public, have presumably interests alike, were using the same river,—the same waters,—though in different ways. The ice-takers were occupying the river under the natural right of dipping water therefrom, and it is as if thousands of men were simultaneously exercising the right together. The enterprise directly fosters the interests of navigation on the river. On the other hand, as we have before said, the right of the traveler, so far as pertaining to the navigation of the river, is, under the circumstances, at most a secondary, theoretical right, and of no real and essential value. Even private property may be taken for public use by affording compensation. Here, if the traveler is not allowed the use of the river, it is because more than compensation is supplied to him in other roads provided for his use.

We think the trial was conducted upon a too literal application of the principles which govern the use of navigable streams, and that the jury were thereby prejudiced against the defendants to their injury.

These views being accepted, it necessarily follows that this portion of the river should be considered as virtually closed during the winter against general traveling. The whole tract cut over must be constantly beset with danger to a traveler who does not keep up an especial acquaintance with the condition of the ice. Besides, the ice-fields, after they have been staked and fenced and scraped, and in some instances connecting fields extend across the river, have so far become the property of the appropriator that an action would lie against

one who disturbs his possession: *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229; 38 Am. Rep. 246.

At the same time the appropriators should by suitable means reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist. It is not necessary, in the present case, to inquire whether the defendants sufficiently observed such caution or not, inasmuch as we are clearly of the belief that the plaintiff's servant in charge of his team was guilty of an act of carelessness which caused the plaintiff's loss.

Even if the defendants were in fault, their delinquency would be a prior act, while the servant's was a subsequent, distinct, independent act. The defendants had no reason to suppose the servant would go in the direction he did, or be heedless in his course if he were to go there. As some judge said: "One man is not required to take another man's discretion in his keeping."

At all events, the defendants' act or omission was not negligence against the plaintiff, — not an act which the plaintiff can complain of. The idea is clearly expressed in 2 Law Quar. Rev. (London), p. 507: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." In such case defendants are not even guilty of contributory negligence; that is, their negligence does not in a legal sense contribute to it or participate in it. It is merely a passive agency, or condition, or situation, through or by which the accident happened, — but no part of its real and controlling cause: *O'Brien v. McGlinchy*, 68 Me. 552, 557.

The servant was hardly even a traveler on the river in the ordinary sense of the term. He was himself an operative at the ice-fields. He came with his team upon the ice by crossing defendants' land, striking a traveled way which led upon the ice, along the shore, up to the field of operations he was to engage in. From a freak of his own, instead of keeping the road, as properly he should, he crossed one of defendants' fields, as properly he should not, and while attempting to go across or around another field of theirs, his team broke through the ice and was lost.

The pretense is set up that the defendants had no fence as a protective barrier at the end of the field extremest from the *west bank* of the river, to prevent the traveler from going upon

the thin ice. None was needed. The exercise of ordinary care by the servant was all that was needed. There was a large ridge of snow and ice at the easterly end of the field, several feet high, thrown up by scraping the field from west to east in preparation for ice-cutting. It seems that the ice was left uncut and solid for a space of twelve or fifteen feet in width inside of the piles or ridge, in order to afford space wide enough for a pair of horses to travel upon while cutting out and handling the cakes of ice. It is a risky track for any horses, but what dangers there are upon the track is incidental to the business. The servant confesses that he was acquainted with the mode of the business, that he knew that the ice had been scraped up to the ridge of snow, knew that there might be holes and thin ice where the field had been scraped, knew that he was going upon the scraped ice, and still he recklessly undertook to conduct his team on the inside of the ridge, when there was an abundance of room to drive safely outside of it. By his carelessness, for which there seems to be no rational explanation, the plaintiff's property was lost.

Motion sustained.

HASKELL, J., concurred in the result reached, but could not agree with the reasoning of the court. He considered the right of navigation in public waters paramount, and though they might be subjected to any other useful purpose, though that use might temporarily impede navigation, still when the use blocked navigation it must be suspended until the right of navigation was exercised. He contended that frozen navigable rivers were public highways, which ordinarily gave the traveler thereon the paramount right of passage as incident to the reasonable enjoyment of his right, which must be exercised in common with such uses as the river, when frozen, was adapted to. "One such use is the harvesting of ice, a use which may impede travel. Both are common rights, and both may be lawfully exercised; but both cannot be enjoyed at the same spot at the same time, because the one may be there destructive of the other, so that it may be reasonable for that use giving the larger public benefit to restrict other uses to a narrower compass; but it cannot lawfully monopolize the whole right, to the utter destruction of all other rights." His honor acknowledged that the business of gathering ice had become of great public benefit, and a remunerative and useful industry; still its nature necessarily required that it should not be subjected to a paramount right of travel so as to destroy its reasonable enjoyment. But as both the traveler and the ice-gatherer were partakers in a common right, and as neither had such paramount right as to permanently and wholly destroy that of the other, both must exercise his right reasonably under all of the circumstances. Continuing, the learned jurist said that, in his opinion, if the public had appropriated a particular part of the ice on a stream or pond, and had worn a well-beaten track thereon, it would not be reasonable for the ice-harvester to interrupt the right of travel. On the other hand, if the ice-gatherer had appropriated and marked a field of ice, leaving room for travel,

it would not be reasonable for the traveler to go upon the field and defile the ice; that both uses were lawful, but neither must exclude the other. And he further says: "Both cannot have the possession and use of the same ice for different purposes, although both have a common right to it so long as it remains unappropriated by either. The taker of water from a stream may not interfere with the navigation of it; but the harvester of ice obstructs the public highway at that place, so the one can no more take the whole ice, and destroy the public highway, than the other without legislative authority could divert the stream, and leave its bed dry and unnavigable. Courts may declare the relative rights of persons, but they cannot extinguish them."

In conclusion, the judge says that "the plaintiff's servant had no need to enter upon the defendant's ice-field, and he is chargeable with notice of the dangerous character of the spot; and for his imprudence in so doing, the plaintiff is not entitled to recover."

ICE—RIGHT TO TRAVEL UPON.—The right of the public to pass over the surface of navigable rivers when the latter are covered with ice does not seem to have been the subject of judicial investigation to any great extent, and no case is found where the questions arising in the principal case have been in conflict and before a court for determination. In *French v. Camp*, 38 Am. Dec. 728, defendant claimed the right to cut a hole in the ice on a roadway for the purpose of watering stock, but the court held that the public have the right to travel on the ice on public rivers, and that any one who cuts a hole in the ice in or near the traveled way is liable for injuries to those passing over such way without fault on their part. And in *State v. Wilson*, 42 Me. 9, where the defendant erected a wharf on the shore of a navigable river, it was held that the use of the shore as a way of travel was a right possessed by the public which the owner of the shore could not abridge; that when the river was covered by ice the right remained the same, and might be exercised at pleasure. In Massachusetts it is held that ponds containing more than ten acres are public property, and that all who own land adjoining them, or can gain access to them without becoming trespassers, have the right of travel thereon, so long as they do not interfere with their reasonable use by others or the public, except when the legislature has provided otherwise: *Inhabitants of West Roxbury v. Stoddard*, 7 Cush. 158.

ID.—RIGHT OF OWNERSHIP IN: *Lorman v. Benson*, 77 Am. Dec. 435; *Wood v. Fowler*, 40 Am. Rep. 330; *Village of Brooklyn v. Smith*, 44 Id. 90; *Brookville etc. Co. v. Butler*, 46 Id. 580, containing a discussion of many cases on the subject; *People's Ice Co. v. Steamer Excelsior*, 38 Id. 246, and note 255-260, treating the topic. The late case of *Brastow v. Rockport Ice Co.*, 77 Me. 100, shows that the Massachusetts rule has been adopted in that state; such rule briefly stated is, that ponds containing ten or more acres are great ponds, and the right to cut ice upon them is a public right, free to all. That in this particular the right of the riparian owner is no greater than that of every other person who can reach the pond without becoming a trespasser upon the lands of others. In support of this rule, see *Gage v. Steinkrauss*, 131 Mass. 222; *Rowell v. Doyle*, 131 Id. 474. In those states where navigable rivers are held to be public property, the riparian proprietor has no title to the ice forming in such streams as an incident to his ownership of the bank, but the ice belongs to the first appropriator, such appropriation being affected by marking, surveying, and staking off the ice, and these acts give sufficient possession to support trespass: *Wood v. Fowler*, *supra*; *Hickey v. Hazard*, 3 Mo. App. 480. On the other hand, where navigable fresh-water streams and ponds are not considered public property, but the bed of which belongs to

the riparian proprietor, the ice forming on the stream is his absolute property, and he may maintain trespass against one who cuts or removes it without license: *Washington Ice Co. v. Shortall*, 101 Ill. 46; *Brooklyn v. Smith*, 44 Am. Rep. 90; *Mill River Mfg. Co. v. Smith*, 34 Conn. 462; *Edgerton v. Huff*, 28 Ind. 36; *State v. Pottmeyer*, 33 Id. 402. The trespass in taking the ice cannot be justified on the ground that the right of navigation required it, or that it is advantageous thereto: *Washington Ice Co. v. Shortall*, *supra*.

AYER v. WESTERN UNION TELEGRAPH COMPANY.

[79 MAINE, 498.]

OMISSION OF MATERIAL WORD IN TRANSMISSION OF TELEGRAPHIC MESSAGE raises a presumption, in the absence of proof to the contrary, that the mistake resulted from the fault of the telegraph company.

STIPULATION IN TELEGRAPH BLANKS that the company shall not be liable for mistakes or delays in transmission, delivery, or non-delivery of unrepeat-
ed messages, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the message, is void as against public policy.

AS BETWEEN SENDER AND INNOCENT RECEIVER OF TELEGRAM, the party who selects the telegraph as means of communication must bear any loss occasioned by errors in transmission on the part of the telegraph company. But the sender can recover his loss from such company.

AS BETWEEN SENDER AND RECEIVER OF TELEGRAM in which an error is made by the telegraph company, the telegram received is the original, and best evidence of the contract binding on the sender.

Wilson and Woodward, for the plaintiff.

Baker, Baker, and Cornish, for the defendant.

By Court, EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800M laths, delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: "Will sell 800M laths delivered at your wharf two net cash. July shipment. Answer quick." It will be seen that the important word "ten," in the statement of price, was omitted.

The Philadelphia party immediately returned by telegraph

the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterward passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at two dollars per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point, we must assume that for such an error the company was in fault: *Bartlett v. Tel. Co.*, 62 Me. 221; 16 Am. Rep. 437.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds:—

1. The company relies upon a stipulation made by it with the plaintiff, as follows: "All messages taken by this company are subject to the following terms: to guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that the said company shall not be liable for mistakes or delays in the transmission, or delivery, or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." This is the usual stipulation printed on telegraph blanks, and was known to the plaintiff, and was printed at the top of the paper upon which he wrote and signed his message. He did not ask to have the message repeated.

Is such a stipulation in the contract of transmission valid

as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void.

Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business.

This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to intrust messages to them for transmission. They may insist on their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality as a guard against their own negligence? It seems clear to us that, having undertaken the business, they ought without qualification to do it carefully, or be responsible for their want of care.

It is true, there are numerous cases in other states holding otherwise, but we think the doctrine above stated is the true one, and in harmony with the previous decisions of this court: *True v. Tel. Co.*, 60 Me. 1; 11 Am. Rep. 156; *Bartlett v. Tel. Co.*, 62 Me. 221; 16 Am. Rep. 437.

2. The defendant company also claims that the plaintiff was not, in fact, damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question whether the message written by the sender and intrusted to

the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important, and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the receiver of the offer may, in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated presupposes the innocence

of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In *Durkee v. Vermont C. R. R. Co.*, 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In *Saveland v. Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract binding on the sender. In *Morgan v. People*, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it as it read. There are *dicta* to the same effect in *Wilson v. M. & N. R'y Co.*, 31 Minn. 481, and *Howley v. Whipple*, 48 N. H. 488.

Telegraph Company v. Schotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message: "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read: "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The court held, however, that there was a completed contract at sixty, that the sender must fulfill it, and could recover his consequent loss of the telegraph company.

It follows that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was ten cents per M.

Judgment for plaintiff for eighty dollars, with interest from the date of the writ.

MISTAKE IN TRANSMISSION OF TELEGRAM is *prima facie* evidence of negligence on the part of the company, and the burden of proof rests upon it to show itself free from fault: *Western Union Tel. Co. v. Tyler*, 24 Am. Rep. 279, and note 283; *Telegraph Co. v. Griswold*, 41 Id. 500; and see *New York etc. Tel. Co. v. Dryburg*, 78 Am. Dec. 338.

CONDITION IN TELEGRAPH BLANK EXEMPTING COMPANY from liability for errors, legality of, and liability under: *Western Union Tel. Co. v. Tyler*, 24 Am. Rep. 279, and note 283; *Becker v. Western Union Tel. Co.*, 38 Id. 356; *Womack v. Western Union Tel. Co.*, 44 Id. 614; *Western Union Tel. Co. v. Blanchard*, 45 Id. 480; *Hart v. Western Union Tel. Co.*, 56 Id. 119; *Aiken v. Western Union Tel. Co.*, 58 Id. 210; *Wann v. Western Union Tel. Co.*, 90 Am. Dec. 395, and note 399; *United States Tel. Co. v. Gildersleeve*, 96 Id. 519, note 523.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

COMBS v. COMBS.

[57 MARYLAND, 11.]

WORDS "DIE WITHOUT ISSUE OF HIS BODY LAWFULLY BEGOTTEN," IN WILL, must be construed to mean a definite failure of issue, and will support a limitation over, if other words in the will do not prevent this result.

DEVISE TO PERSON AND HEIRS OF HIS BODY LAWFULLY BEGOTTEN, WITH FULL POWER and authority to sell and convey the estate devised in his lifetime, or to dispose of it by last will and testament, gives to the devisee an absolute and unqualified fee which is not determinable on any event whatsoever, and a limitation over in such case is void, because it is inconsistent with the absolute property given to the devisee first named.

EXECUTORY DEVISE MAY BE LIMITED AFTER FEE-SIMPLE; but in such case, the fee must be made determinable on some contingent event. It must be provided that the fee is to cease, and the executory devise to vest, on a contingency that must happen, if at all, within a life or lives in being, and twenty-one years and a fraction thereafter.

EJECTMENT, brought by the plaintiffs below as heirs at law of George H. Combs, the son and devisee of Alexander Combs, deceased, against James N. Combs, to recover a tract of land claimed and held by the latter under a devise contained in the will of the said Alexander Combs, which devise is quoted in the opinion of the court. The jury found for the plaintiffs, and the defendant appealed.

Daniel R. Magruder, for the appellant.

Robert C. Combs and Joseph F. Morgan, for the appellees.

By Court, BRYAN, J. The will of Alexander Combs contained the following clause: "I give and devise all my estate, real and personal, to my son, George H. Combs, to him and the heirs of his body lawfully begotten, with full power and authority to him, the said George H. Combs, to sell and convey the same in his lifetime, or to dispose of the same by last will and testament; but should he, the said George H. Combs, die without issue of his body lawfully begotten, and without having disposed of the same by sale, or by last will and testament, either in whole or in part, then I give and devise my said estate, both real and personal, or the part remaining as above undisposed of, to my cousins, James Nathaniel Combs and Thomas B. Price, in equal portions, share and share alike, to them and their heirs."

We are to decide whether the limitation to James N. Combs and Thomas B. Price is valid. By virtue of the act of 1862, chapter 161, the words of the will, "die without issue of his body lawfully begotten," must be construed to mean a definite failure of issue, and will support the limitation over, if other words in the will do not prevent this result. The testator gives his estate to his son George, and the heirs of his body lawfully begotten, with full power and authority to sell and convey it in his life-time, or to dispose of it by last will and testament. It is difficult to see how the devisee could have more absolute control and dominion over the property. Even if there had been no words of inheritance, and the estate had merely been devised to George generally and indefinitely, the absolute power of disposition would have carried the fee: *Benesch v. Clark*, 49 Md. 497. An executory devise may be limited after a fee-simple; but in such case, the fee must be made determinable on some contingent event. It must be provided that the fee is to cease, and the executory devise to vest, on a contingency, which must happen, if at all, within a life or lives in being, and twenty-one years and a fraction thereafter. In the case before us, the fee given to George is absolute and unqualified, and is not determinable on any event whatsoever. In *Ida v. Ida*, 5 Mass. 500, Chief Justice Parsons, in speaking of a similar case, said: "Whenever it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of

specifying who may take, amounts to an unqualified gift." And Chancellor Kent, in delivering the unanimous opinion of the court of errors in *Jackson v. Robins*, 16 Johns. 537, said: "We are obliged to say that an absolute ownership or capacity to sell in the first taker, and a vested right by way of executory devise in another, which cannot be affected by such alienation, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void." Both of these great jurists cited and relied upon *Attorney-General v. Hall*, Fitzg. 314, decided by Lord Chancellor King, assisted by the master of the rolls and Chief Baron Reynolds, and quoted with approval by Lord Hardwicke in *Flanders v. Clark*, 1 Ves. 9. These assuredly are authorities of great weight. We think that they ought to be considered as settling the law; although contrary opinions have been declared by some very learned courts.

We agree with the circuit court in holding that the executory devise is void, and that on the death of George Combs intestate, the land descended to his heirs at law.

Judgment affirmed.

CONSTRUCTION OF WORDS "DIE WITHOUT ISSUE": See *In Matter of New York etc. R'y Co.*, 59 Am. Rep. 478; *Quackenbos v. Kingsland*, 55 Id. 771, note 774, where this subject is discussed; *Hill v. Hill*, 15 Id. 545; *Allender's Lessee v. Sussan*, 3 Id. 171; *Presley v. Davis*, 62 Am. Dec. 396; *Lewis v. Claiborne*, 26 Id. 270.

WHEN DEVISEE TAKES FEE, REMAINDER OVER BEING VOID FOR REPUGNANCY: See *White v. Crenshaw*, 60 Am. Rep. 370; *Stowell v. Hastings*, 59 Id. 748; *Mitchell v. Morse*, 52 Id. 781; *Canedy v. Jones*, 45 Id. 777; *Henderson v. Blackburn*, 44 Id. 780, note 783; *Moore v. Sanders*, 40 Id. 703; *Bona v. Meier*, 29 Id. 493; *Jones v. Bacon*, 28 Id. 1, note 4; *McKenzie's Appeal*, 19 Id. 525. But see *Jones v. Jones*, 57 Id. 266; *Stuart v. Walker*, 39 Id. 311, note 318; *Reinders v. Koppelman*, 30 Id. 802; *Burleigh v. Clough*, 13 Id. 23. An estate vests absolutely in the first taker, when the gift is to him and his issue, or to him and the heirs of his body, and the limitation over is upon an indefinite failure of issue: *Cleveland v. Havens*, 78 Am. Dec. 90; or where the limitation over is too remote: *Brattle Square Church v. Grant*, 63 Id. 725, note 741, where other cases in that series are collected. A devise to one "in fee-simple for life" passes an estate in fee: *McAllister v. Tate*, 73 Id. 119, note 121. In Texas, where an estate in lands is created by will, it will be deemed an estate in fee-simple, if a less estate is not limited by express words: *Bell County v. Alexander*, 73 Id. 268, note 276, collecting other cases.

EXECUTORY DEVISE LIMITED AFTER FEE, WHEN VOID: See *Van Horne v. Campbell*, 53 Am. Rep. 166; *Slaughter v. Slaughter*, 79 Am. Dec. 111, note 113, where other cases in that series are collected. A limitation by way of executory devise, which may not take effect within a term of a life or lives in being at the testator's death, and twenty-one years and nine months thereafter, is void for remoteness: *Brattle Square Church v. Grant*, 63 Id. 725, note 740, where other cases are collected.

BALTIMORE AND OHIO RAILROAD Co. v. BOYD.

[67 MARYLAND, 32.]

PLAINTIFF IN TRESPASS QUARE CLAUSUM FREGIT IS NOT BOUND TO GIVE AFFIRMATIVE PROOF that he has sustained any particular amount of damage. Every unauthorized entry upon the land of another is a trespass, which entitles the owner to a verdict for some damages, although they may, under some circumstances, be so small as to be merely nominal.

WHERE PLAINTIFF'S LAND HAS BEEN CONTINUOUSLY AND BENEFICIALLY OCCUPIED BY RAILROAD COMPANY as the bed of its railroad tracks, he is entitled to a reasonable, but a substantial, compensation for such use, to be measured by what would be a fair rental value for the ground so occupied during the time covered by the action, although he offers no evidence whatever of any special damages sustained by him, or that he was hindered or obstructed in any proposed use of his land by reason of the presence and use of the railroad tracks.

INSTRUCTIONS NOT SUFFICIENTLY DEFINITE, AND CALCULATED TO MISLEAD JURY, ought not to be given.

JUDGE OF TRIAL COURT SHOULD INTERPOSE TO RESTRAIN EVERYTHING TENDING TO MISLEAD JURY, and divert their minds from the strict line of inquiry with which they are charged.

COUNSEL SHOULD NEVER BE PERMITTED TO ARGUE TO JURY AGAINST INSTRUCTIONS of the court, nor to indulge in any line of argument or comment tending to induce them to disregard the instructions given for their government.

IF INSTRUCTIONS TO JURY ARE AMBIGUOUS, AND COURT'S ATTENTION IS CALLED TO FACT, it is its duty, at any stage of the trial before the jury have acted upon them, to remove the ambiguity, and make the meaning of the court plain.

DECLARATIONS MADE BY COUNSEL WHILE ARGUING QUESTION OF DAMAGES before a jury of condemnation of the property in question cannot be admitted in evidence in a subsequent action of trespass *quare clausum fregit*, for the purpose of showing malice on the part of the defendant, and thereby enhancing the damages.

TRESPASS *quare clausum fregit*. The opinion states the case.

Hugh L. Bond, Jr., and John K. Cowen, for the appellants.

Charles J. Bonaparte, for the appellees.

By Court, ALVEY, C. J. The record now before us contains four appeals,—three by the defendant from three several judgments against it, and one by the plaintiffs from one of those judgments.

There were three several actions of trespass *quare clausum fregit* brought by the plaintiffs below against the defendant, the Baltimore and Ohio Railroad Company, and by agreement the three actions were tried together, but a separate verdict

was rendered in each case, and consequently separate judgments were entered.

The first of these cases was here on a former appeal, and is reported in 63 Md. 325. The facts of that case are substantially the facts of all the present cases, so far as the main question on these appeals is concerned; the only material difference being that the two last cases were brought to cover two successive periods of time. The *locus in quo* in all three of these actions is the same as that described in 63 Md. 330; and the circumstances of the entry upon and user thereof by the defendant are there fully stated. In that case, the court having determined that as the defendant's entry upon and user of that portion of the lot of vacant and unimproved ground in the city of Baltimore, belonging to the plaintiffs, occupied as a bed for the tracks of its railroad, was unauthorized and therefore a wrong, the plaintiffs were entitled to recover therefor. But in view of the facts then disclosed, this court held that the plaintiffs were not entitled to recover exemplary damages, there being no element of fraud or malice, or evil intent, on the part of the defendant in entering upon and using the ground as it did.

In the trial of the present cases, the main subject of contest was as to the proper measure of damages to be awarded to the plaintiffs. At the request of the plaintiffs, the court granted three prayers as instructions to the jury as to what damages should be allowed; and at the instance of the defendant, two other prayers were granted upon the same subject; but the first prayer offered by the defendant was refused by the court. The plaintiffs excepted to the instructions given on the request of the defendant, and the latter excepted to the instructions given at the instance of the plaintiffs, and also to the refusal to grant its first prayer. The rulings upon the prayers are the subjects of the third bill of exception taken by the defendant, and of the second bill of exception taken by the plaintiffs.

By the first of the instructions for the plaintiffs, the jury were directed that, upon finding the facts enumerated, their verdict in the first case should be for the plaintiffs, "with such damages as would, in the judgment of the jury, amount to a fair compensation for the said unauthorized use of the said tracks." And as applicable to the second and third cases, the jury were directed that, in finding for the plaintiffs, their verdict should be for such an amount as would, "in their judgment, fully compensate the plaintiffs for such continued and

unauthorized use of the said tracks between the dates named against the wishes of the plaintiffs, and under all the circumstances disclosed by the evidence."

By the first of the defendant's prayers, which was refused, the court was asked to instruct the jury that there was no evidence legally sufficient from which they could find that there was any substantial damage or injury done to the *locus in quo*, by the acts of the defendant, and therefore the verdict should be for nominal damages only. The court, however, while refusing to require the jury to find their verdict for nominal damages merely, did instruct them, by granting the second prayer of the defendant, that if they found from the evidence that no substantial damage or injury was done to the plaintiffs' lot of ground, by any act or user thereof by the defendant, the verdict should be for nominal damages only. We do not understand that there is any question made as to the propriety of granting the defendant's third prayer by the court.

It clearly appears that since the death of Philip D. Boyd, in 1881, who held a life estate in the premises, the defendant in these cases has been, down to a very recent date, a tortfeasor, in the use and continual occupancy of the *locus in quo*, as against the heirs at law of Mrs. Clarissa Boyd, deceased,—those heirs being plaintiffs in the present actions. It is true, the original entry into, and the construction and use of railroad tracks over, the *locus in quo*, were all supposed to be authorized by virtue of certain condemnation proceedings had under certain city ordinances for opening of streets, but which proceedings proved to be defective and insufficient to secure to the defendant the right of way over the lot of ground in question. The defendant, therefore, was not a willful wrongdoer. This was determined by this court in the case reported in 63 Md. 325. The lot of ground belonging to the plaintiffs was, and still remains, uninclosed, and without any improvement thereon whatever, apart from the railroad tracks placed there by the defendant. The space occupied by the road in passing through this lot was very small, being only about eighteen by thirty-six feet. The defendant, since the decision of this case on the former appeal, has procured condemnation of the right of way for its road through the lot, and the inquisition has been confirmed; but the present actions were brought for the repeated trespasses on the lot from the time of the death of Philip D. Boyd to the time of the taking of the recent inquisition by the defendant.

That the entry upon and use of the land, though under color of right, and though the ground was uninclosed and vacant, was unlawful and therefore a trespass, admits of no question or dispute; and consequently for such invasion of their rights the plaintiffs are entitled to recover some damages of the defendant. It is not necessary, in order to entitle the plaintiffs to a verdict, that they should have given affirmative proof that they had sustained any particular amount of damages; for every unauthorized entry upon the land of another is a trespass, and whether the owner suffer substantial injury or not, he at least sustains a legal injury, which entitles him to a verdict for some damages; though they may under some circumstances be so small as to be merely nominal. *Ashby v. White*, 2 Ld. Raym. 955; *Mellor v. Spateman*, 1 Wms. Saund., note 2, p. 346 a; *Taylor v. Henniker*, 12 Ad. & E. 488; *Dixon v. Clow*, 24 Wend. 188.

The present cases, however, we think, are not cases for nominal damages merely. For though there is an entire absence of any such element of wanton or malicious motive, or such reckless disregard of the rights of others, in the commission of the trespass, and the repetitions thereof, as would entitle the plaintiffs to claim punitive or exemplary damages, yet the strip of ground belonging to the plaintiffs has been continuously and beneficially occupied by the defendant, as the bed of its railroad tracks, since the death of Philip D. Boyd to the time of bringing the last suit; and for such use of the land a reasonable, but a substantial, compensation ought to be paid. It is true, there is no evidence whatever of any special damages sustained, or that the plaintiffs were hindered or unobstructed in any proposed use of their lot, by reason of the presence and use of the railroad tracks; but nevertheless, we are of opinion that the plaintiffs are entitled to a reasonable compensation for the use of their land, and we think this is measured by what would be a fair rental value for the ground, occupied as it has been for the time covered by the actions, and nothing more. In such cases as the present, where there is nothing to show that any special damage has been suffered, the principle seems to be established by many respectable authorities, that the plaintiff is entitled to recover such compensation as the use of the ground was worth during the time and for the purpose it was occupied. It has been so held in several cases, and we need only refer to *McWilliams v. Morgan*, 75 Ill. 473; *City of Chicago v.*

Huenerbein, 85 Ill. 594; 28 Am. Rep. 626; *Ward v. Warner*, 8 Mich. 508. And though the facts are somewhat different, the same principle of compensation was adopted in the cases of *Blesch v. Chicago etc. R'y Co.*, 43 Wis. 183; *Car v. Sheboygan etc. R. R. Co.*, 46 Id. 625.

Such, then, being the proper rule of damages in these cases, the instructions given at the request of the plaintiffs were not sufficiently definite, and were well calculated to mislead the jury. They were certainly susceptible of a construction that would permit the jury to transcend the fair rental value of the piece of ground occupied by the defendant, as the measure of compensation to be allowed; and that such was the understanding or interpretation of these instructions by the plaintiffs' counsel is made manifest by the arguments and illustrations urged by him while addressing the jury, as reported and set out in the defendant's fourth and fifth bills of exception. We are therefore of opinion that there was error in granting these instructions in the terms therein employed; and that there was also error in granting the second prayer of the defendant, but no error in refusing the first, or in granting the third, of the defendant's prayers.

In the view we have stated of the measure of recovery in these cases, the questions of evidence raised by the first and second bills of exception taken by the defendant become quite immaterial, and it is unnecessary to express any opinion in regard to them.

With respect to the fourth and fifth exceptions taken by the defendant, they present a question of practice as to the right and duty of the trial judge to interpose to restrain counsel, who is alleged to be indulging in argument and illustration before the jury, unwarranted by the instructions of the court, and which will, if unrestrained, likely mislead the jury in the finding of their verdict. This is a matter that must, in the nature of things, rest largely in the discretion of the trial court. It is, however, proper for us to say that no duty incumbent upon the judge of a trial court is more imperative, nor more important to the fair and orderly administration of justice, than that of interposing to restrain everything in the course of the trial that tends to mislead the jury, and to divert their minds from the strict line of inquiry with which they are charged. It is the function and duty of the court, when called upon in the trial of civil cases by either of the parties, to *instruct* the jury as to the principles of law applicable to the

case on trial, and it is the duty of the jury to observe and conform to such instruction. Counsel can never be permitted to argue to the jury against the instructions of the court, nor to indulge in any line of argument or comment that would tend to induce them to disregard the instructions given for their government. This is a matter that is always within the control of the court: *Sowerwein v. Jones*, 7 Gill & J. 335; *Bell v. State*, 57 Md. 120. When, however, the instructions given are ambiguous, or susceptible of different interpretations, and the attention of the court is called thereto, no matter at what stage of the trial, if before the jury have acted thereon, it at once becomes the duty of the court to remove the ambiguity, and to make the meaning of the court plain. Here, as we have shown, the instructions were indefinite, and were, to some extent at least, open to the construction that was being placed thereon by the counsel of the plaintiffs when he was interrupted by the adverse counsel, and the court's attention called to what he was contending for before the jury, as set forth in the fifth exception. The counsel was not restricted in his contention by any affirmative action of the court; and we infer from such non-action that the counsel, in urging the allowance of a large and discretionary amount of damages, was, in the opinion of the court, conforming his contention to the instructions given the jury. We have said that the instructions were erroneously granted; and whether or not they were rightly construed in argument before the jury is a question quite immaterial to be decided for the retrial of the cases.

There were two bills of exception taken by the plaintiffs. The first was taken to the refusal by the court to admit as evidence, to prove malice on the part of the defendant, certain declarations or statements made by counsel on a former occasion, in the course of a trial, and while arguing the question of damages before a jury of condemnation of the property in question. We know of no principle or authority, and have been referred to none, upon which such declarations of counsel as those here offered could be admitted for the purpose indicated. We therefore think the court was clearly right in excluding them.

The second exception taken by the plaintiffs was to the granting by the court of the second and third prayers of the defendant. As to the second prayer, thus excepted to, we have said there was error; but as to the third, there was no

error, and therefore no ground for the exception to that instruction.

It follows that the several judgments entered in these cases must be reversed, and a new trial ordered.

Judgments reversed, and new trial awarded.

LAW PRESUMES DAMAGE FROM TRESPASS: See *McConnel v. Kibbe*, 85 Am. Dec. 285; *Attwood v. Fricot*, 76 Id. 567, note 571, where other cases in that series are collected.

INSTRUCTIONS HAVING TENDENCY TO MISLEAD JURY SHOULD NOT BE GIVEN: See *State v. Benham*, 92 Am. Dec. 417; *Southern R. R. Co. v. Kendrick*, 90 Id. 332, note 344, where other cases in that series are collected.

DUTY OF COURT TO EXPLAIN INSTRUCTIONS: See *Rosenbaum v. Weeden*, 98 Am. Dec. 737, note 749; *Ward v. Churn*, 98 Id. 749, note 761; *Peahine v. Shepperson*, 94 Id. 468, note 477, where other cases in that series are collected.

RIGHT AND DUTY OF COURT TO STOP IMPROPER COMMENTS OF COUNSEL AT TRIAL: See *Martin v. State*, 56 Am. Rep. 812, note 814, where this subject is discussed; *Taft v. Fiske*, 54 Id. 459; *Cartwright v. State*, 49 Id. 827; *Cleveland Paper Co. v. Banks*, 48 Id. 334, note 336, where this question is considered; *Union Central L. I. Co. v. Cheever*, 38 Id. 573; *Hatch v. State*, 34 Id. 751; *Coble v. Coble*, 28 Id. 338; *Brown v. Swineford*, 28 Id. 582; note to *State v. White*, 27 Id. 142; *Long v. State*, 26 Id. 19; *Commonwealth v. Scott*, 25 Id. 87; *Tuller v. Talbot*, 76 Am. Dec. 695, note 698; *Doster v. Brown*, 71 Id. 153; *St. Martin v. Desnoyer*, 61 Id. 494.

DUDLEY v. HURST.

[67 MARYLAND, 44.]

EVERYTHING REGARDED BY LAW AS FIXTURE, AS BETWEEN MORTGAGOR AND MORTGAGEE, is sufficiently covered by a mortgage of a farm, "together with the buildings and improvements thereupon, and the rights, roads, waters, privileges, appurtenances, and advantages thereto belonging or in any wise appertaining."

MACHINERY USED IN CANNING BUSINESS IS FIXTURE, and, as between the mortgagor and the mortgagee of the land upon which it is erected, will pass to the latter, where parts of it are attached to the soil and the other parts are necessary to the use of the parts so attached.

WHERE PRINCIPAL PART OF MACHINERY BECOMES FIXTURE BY ACTUAL ANNEXATION to the soil, such part of it as may not be so physically annexed, but which, if removed, would leave the principal part unfit for use, and would not of itself and standing alone be well adapted to general use elsewhere, is considered constructively annexed.

INJUNCTION WILL BE GRANTED TO OWNER OF FARM HAVING ON IT LARGE CANNING FACTORY in full operation, with a large growing crop of corn to be canned, to prevent a threatened sale and removal of the canning machinery.

INJURY IS IRREPARABLE WHICH CANNOT BE MEASURED by any known pecuniary standard.

ACTS AND DECLARATIONS OF GRANTOR SUBSEQUENT TO HIS DEED cannot be received in evidence to invalidate it.

APPEAL. The opinion states the case.

C. C. Magruder and Frank H. Stockett, for the appellants.

William Stanley and Joseph K. Roberts, for the appellees.

By Court, STONE, J. Thomas Clagett of Weston was the owner in fee of a large tract of land lying in Prince George's County, Maryland, containing about six hundred acres. Upon this farm he resided and had established a canning factory for the purpose of canning fruits, vegetables, and corn, principally the latter. In July, 1883, he mortgaged this farm to William B. Bowie. This mortgage is not in the record, but we have been furnished with a certified copy taken by the proper officers from the records of Prince George's County.

This mortgage, after describing and granting the land in the usual form, goes on to say:—

"Together with the buildings and improvements thereupon, and the rights, roads, ways, waters, privileges, appurtenances, and advantages thereto belonging, or in any wise appertaining."

This farm was sold under the mortgage and purchased by the complainants in April, 1885. They took possession of the farm and rented it for the residue of the year 1885, and their tenants continued the canning business.

In March, 1885, the mortgagor, Clagett, executed a chattel mortgage of the machinery in the canning factory to the respondents, and in September, 1885, the respondents were about to sell the machinery under the power of sale contained in their mortgage, when the complainants obtained a preliminary injunction against such sale, upon the ground that the machinery in the canning factory were fixtures, and passed to them under their mortgage of July, 1883.

A good deal of testimony was then taken, and upon the final hearing the court below dissolved the injunction, and dismissed the bill, and the complainants appealed to this court.

It will be seen from this brief statement of the case that the important question in the case is, whether the machinery in the canning factory passed to the complainants under the mortgage of July, 1883, or in other words, whether such ma-

chinery, as between the mortgagor and mortgagee, were or were not fixtures.

The learned judge who tried the case below did not decide that question, but dismissed the bill upon the ground that complainants had an adequate remedy at law, even if this machinery did belong to them.

But if the machinery had really become, by annexation, actual or constructive, a part of the freehold, we entertain no doubt of the power of a court of equity to restrain and prevent its attempted severance. But if the machinery still retained its distinctive character as a personal chattel, it did not in fact belong to the complainants, but to the respondents, and then the complainants had no right to ask the interposition of a court of equity in their behalf, and the bill must be dismissed. The character of the machinery is then the only question of importance in the case.

A learned author of a work on fixtures (Ewell) says there is perhaps no other legal term which has been used in so many differing and often contradictory significations as the term "fixtures." The term "fixture" is generally used in reference to some originally personal chattel, which has been actually or constructively affixed either to the soil itself, or some structure legally a part of such soil.

The tests by which a fixture is determined are generally these: 1. Annexation to the realty, either actual or constructive; 2. Adaptation to the use of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed: Ewell on Fixtures; Tyler on Fixtures; Jones on Mortgages.

Of these tests the most important is the question of intention. This is clearly shown by the fact that the law is very different between landlord and tenant and mortgagor and mortgagee, — or what is the same, vendor and vendee; many things being held as fixtures between vendor and vendee which do not lose their character of personal chattels when the question is between landlord and tenant. This case is to be governed by the law as it exists between mortgagor and mortgagee, or vendor and vendee, and not as it is between landlord and tenant.

We have quoted a portion of the mortgage under which the appellants claim, not for the purpose of showing that the machinery in question was specifically included in its terms, but for the purpose of showing that nothing that was actually or constructively affixed to the freehold was excepted from its operation. The mortgage is broad enough, it will be seen, to cover everything that the law would, as between mortgagor and mortgagee, determine to be a fixture, and the question is resolved into whether this machinery is a "fixture."

The business of canning is a comparatively new one, and the owner of this farm, Mr. Clagett, having commenced this business in 1882 as an experiment, and being satisfied with the results, determined to make it his permanent business. The main part of the machinery consisted of a boiler, which was placed upon a brick foundation in a boiler-house built for that purpose. This building is attached to the main building both with mortices and spikes. In order to remove the boiler, which weighs about ten thousand pounds, it would be necessary to pull down the whole boiler-house, including the sills. There is connected with the boilers by steam-pipes a steam-pump fixed on a hard-wood foundation, strengthened by heavy timbers driven into the ground, and the foundation is spiked to these timbers. Running from the boiler is a large steam-pipe which is carried into the main building and made fast to the ceiling above; from this pipe there are several pipes which pass down the side of the house to the ground, and two feet below the floor. This piping connects with the kettles, scalders, etc., and furnish the steam for them. The kettles rest upon hard-wood foundations two feet under the floor; these are in the canning-house proper, as distinguished from the boiler-house. There are gasoline pots which are upon a stand with a brick and sheet-iron foundation under them, and are connected with a gasoline tank about thirty feet from the main building, which tank is in a house built for that purpose.

To remove the boiler and steam-pump, it would, as we have said, been necessary to tear down the boiler-house; and to remove the process-kettles, it would be necessary to tear up the whole floor of the process-room, which is the main portion of the building. The removal would destroy the piping, which was cut to fit the house; even the kettles and tubs could not be removed through the doors, as they were put in before the building was completed. The building was constructed for canning purposes only, and when so constructed, and the ma-

chinery placed in it, the business was intended to be permanent. The farm itself furnished the main portion of the corn, fruits, and vegetables canned.

That the machinery above described, and which constituted the motive power of the factory, is a fixture, and as between mortgagor and mortgagee passed to the latter, we think well settled. Chancellor Johnson, who seems to have favored the relaxation of the ancient rule as far as practicable, in *McKim v. Mason*, 3 Md. Ch. 186, decided that the motive power of a cotton-mill, consisting of boiler, engine, etc., passed to the mortgagee, even when they were placed upon the land after the mortgage was executed. In support of his position, the chancellor cites the cases of *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; 38 Am. Dec. 368; *Powell v. Monson & B. M.*, 3 Mason, 459; *Farrar v. Stackpole*, 6 Greenl. 154; 19 Am. Dec. 201; *Voorhis v. Freeman*, 2 Watts & S. 116; 37 Am. Dec. 490.

In *Kirwan v. Latour*, 1 Har. & J. 289, 2 Am. Dec. 519, the matter in controversy was a distillery, and Chase, C. J., said: "The case of vendor and vendee is different from that of landlord and tenant. In the latter case, the law allows the tenant to remove many things which may be considered as fixed. This is for the benefit of trade; and where a tenant puts up anything for the purpose of carrying on his trade, he may remove it. The pumps, cisterns, iron grating and door, distillery, and house mills passed by this deed, but not the joists, vats, buckets, pickets, and faucets, which are not fixed to the freehold."

Many other cases might be cited from other states showing that machinery located as that we have described passes to the mortgagee, but it is hardly necessary to cite them.

But it seems to be intimated in *Kirwan v. Latour*, above cited, that although what was actually fastened to the soil passed by the deed, such parts of the distillery as were not so fixed did not so pass. This case was decided in 1802. But since the decision of that case, the doctrine of constructive annexation has been much discussed. From the general current of decisions, the following principle seems clearly deducible: That where, in the case of machinery, the principal part becomes a fixture by actual annexation to the soil, such part of it as may be not so physically annexed, but which, if removed, would leave the principal thing unfit for use, and would not of itself, and standing alone, be well adapted for general use elsewhere, is considered constructively annexed.

Thus the key of a lock, the sail of a wind-mill, the leather belting of a saw-mill, although actually severed from the principal thing, and stored elsewhere, pass by constructive annexation. They must be such as go to complete the machinery, which is affixed to the land, and which, if removed, would leave the principal thing incomplete and unfit for use: *Beardsley v. Ontario Bank*, 31 Barb. 619, decided in 1859; *Burnside v. Twitchell*, 43 N. H. 390, decided in 1861.

In this case there are some articles not actually annexed to the soil, such as crates, capping-machines, and work-tables, but are essentially necessary to the working of the principal machinery, and pass by constructive annexation. The main machinery would not be in working condition without them, and they are not adapted for general purposes.

We are therefore of opinion that the whole machinery of the canning factory passed under the mortgage to Bowie, and consequently to his vendees under the mortgage sale.

The remaining question in the case is one of jurisdiction, the learned judge below having dismissed the bill upon the ground that it did not disclose a case for the interposition of a court of equity. In this we think he was in error.

Here was a large canning factory in full operation during the canning season, and with a large growing crop of corn to be canned. The season for canning is a short one, and requires many employees in the process, as well as in caring for and gathering the crops to be canned where they are raised upon the farm. To sell and remove the whole machinery in the midst of the short canning season would certainly involve the destruction of the property in the character in which it was then and had been for some years held and enjoyed. The canning-house would have been rendered useless, and the growing crop of corn comparatively worthless, the employees' discharge rendered necessary, and the ruin of the tenants carrying on the factory probable.

One of the grounds laid down by this court for the interposition of a court of equity in *Gilbert v. Arnold*, 30 Md. 29, is where "the trespass goes to the destruction of the property in the character in which it has been held and enjoyed." That the facts stated, and the relief asked in the bill, fully come up to the standard of the destruction of the property in the character in which it had been held and enjoyed, we think there can be no doubt. In *Shipley v. Ritter*, 7 Id. 408, 61 Am. Dec. 371, this court decided that a court of equity would step in and

prevent the destruction of fruit or ornamental trees, upon the ground that destruction presented a case of irremediable mischief going to the destruction of the estate in the character in which it had been enjoyed.

"If," says Judge Story, "the trespass be fugitive, and temporary and adequate compensation can be obtained at law, there is no ground to justify the interposition of a court of equity. But if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future,—if indeed the courts of equity did not interfere in cases of this sort,—there would be great failure of justice in the country."

In *Scully v. Rose*, 61 Md. 408, this court granted an injunction to prevent digging ore from an ore bank, upon the ground that it was a permanent injury to the property.

But there is, indeed, another aspect in which it may be viewed. Irreparable injury is one well-known ground for an injunction. An injury may be said to be irreparable when it cannot be measured by any known pecuniary standard. By what standard could a jury assess and determine the damage done to the true owner of the factory by the breaking up of his business at that critical period? Before he could be compensated, an estimate would have to be made of his outlay, the contracts upon which he was liable, and his prospective profits or losses. How much of this could legally be gone into in an action of replevin or trespass it is unnecessary to determine. It is enough to say that under the circumstances of this case we see no adequate remedy at law.

It is not necessary to refer to the exceptions to the evidence, further than to say that the acts and declarations of a grantor subsequent to the deed cannot be heard to invalidate his own deed.

The decree will be reversed, and the case remanded, that the injunction may be made perpetual.

As to Joseph K. Roberts, one of the respondents, the bill will be dismissed, as he appears only to have been acting as an attorney of respondents in conducting the sale.

Decree reversed and case remanded.

IRREPARABLE INJURY WITHIN MEANING OF LAW OF INJUNCTIONS. — The term "irreparable" has acquired in the law of injunctions a meaning which is not, perhaps, quite in keeping with the derivation of the word or its literal signification. There are injuries incapable of being repaired which a court of equity does not regard as irreparable. And on the other hand, there

are injuries that can be repaired, which it will, nevertheless, treat as irreparable, if the person inflicting or threatening them be insolvent or unable to respond in damages. The rule on this subject, deduced from the cases by Pearson, J., in *Gause v. Perkins*, 3 Jones Eq. 177, 69 Am. Dec. 728, is thus stated: "The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where, from its nature, it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." This is as accurate a definition as any that has been given, and is probably as definite as any that can be framed. The question as to what is irreparable injury, such as to justify a court of equity in restraining a trespass, is considered at length in the note to *Jerome v. Ross*, 11 Am. Dec. 500 et seq. In the present note it is proposed to show, generally, what injuries are and what are not considered to be irreparable within the meaning of the law of injunctions.

INJURY THAT CANNOT BE COMPENSATED BY DAMAGES in an action at law is irreparable. The best criterion for determining whether or not an injury is irreparable is this: Can complete compensation for it be had by a recovery of damages in an action at law? An injury which cannot be adequately compensated by a verdict for damages is generally regarded as irreparable. And an injury which can be fully compensated by damages at law is not irreparable: *Cockey v. Carroll*, 4 Md. Ch. 344; *Varney v. Pope*, 60 Me. 192; *Whitfield v. Rogers*, 26 Miss. 84; 59 Am. Dec. 244; *Burgess v. Kattleman*, 41 Mo. 480; *Wason v. Sanborn*, 45 N. H. 169; *Morris Canal & R. Co. v. Central R. R. Co.*, 16 N. J. Eq. 419; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Mechanics' etc. Bank v. Debolt*, 1 Ohio St. 591; *Wilson v. City of Mineral Point*, 39 Wis. 160.

INJURY WHICH CANNOT BE MEASURED BY ANY PECUNIARY STANDARD, or which it is impossible or hardly possible to measure, is regarded as irreparable: *Joyce on Doctrines and Principles of Injunctions*, 218; *London & N. W. R'y Co. v. Lancashire & Y. R'y Co.*, L. R. 4 Eq. Cas. 174; *Commonwealth v. Pittsburgh etc. R. R. Co.*, 24 Pa. St. 159; 62 Am. Dec. 372; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Burnley v. Cook*, 13 Tex. 586; 65 Am. Dec. 79; *Wilson v. City of Mineral Point*, 39 Wis. 160; *Manhattan Mfg. Co. v. New Jersey etc. Co.*, 23 N. J. Eq. 161. In the case of *London & N. W. R'y Co. v. Lancashire & Y. R'y Co.*, *supra*, the defendants had placed an obstruction partly on a public footway and partly on land belonging to the plaintiffs, a rival railway company, so as to block up the access to a station of the plaintiffs. The bill alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act done was without any color of title on the part of the defendants. The injunction was granted. Vice-Chancellor Wood, in delivering the opinion in the case, said: "It is one of those cases of irreparable mischief occasioned by a trespasser against persons in possession which require relief in equity. . . . In this case it is impossible to say what amount of traffic will be lost while the right is being tried." Irreparable injury, that is, the foundation for intervention by injunction, is not irreparable, because it is so small that it may not be estimated, but because it is likely to be so great as to be incapable of compensation in damages: *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221. The fact that the injury is a repeated and continuing one, and cannot for that reason be estimated except by conjecture, will lead the court to restrain it as irreparable: *Commonwealth v. Pittsburgh etc. R. R. Co.*, 24 Pa. St. 159; 62 Am. Dec. 372; *London & N. W. R'y Co. v. Lancashire & Y. R'y Co.*, *supra*.

INJURY WHICH TENDS TO DESTRUCTION OF ESTATE, or which is of such a character as to work the destruction of the property as it has been held and enjoyed, will be treated as irreparable: *Loundes v. Bettle*, 10 Jur., N. S., 226; *Hopkins v. Caddick*, 18 L. T. 236; *Crompton v. Lea*, L. R. 19 Eq. 115; *Leeds v. Marsh*, 8 Hare, 97; *Hervey v. Smith*, 1 Kay & J. 389; *Powell v. Aikin*, 4 Id. 343; *Mitchell v. Dors*, 6 Ves. 147; *Erhardt v. Boaro*, 113 U. S. 537; *United States v. Gear*, 3 How. 121; *United States v. Parrott*, 1 McAll. 271; *Le Roy v. Wright*, 4 Saw. 530; *Merced Mining Co. v. Fremont*, 7 Cal. 317; 68 Am. Dec. 262; *Logan v. Driscoll*, 19 Cal. 623; 81 Am. Dec. 90; *More v. Massini*, 32 Cal. 590; *Richards v. Dower*, 64 Id. 62; *Shipley v. Ritter*, 7 Md. 408; 61 Am. Dec. 371; *Reddall v. Bryan*, 14 Md. 444; 74 Am. Dec. 550; *Gilbert v. Arnold*, 30 Md. 29; *Mayor etc. of Frederick v. Groshon*, 30 Id. 436; 96 Am. Dec. 591; *Ryan v. Brown*, 18 Mich. 196; *Webber v. Gage*, 39 N. H. 182; *Holman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Bird v. Wilmington & M. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739; *Burnley v. Cook*, 13 Tex. 586; 65 Am. Dec. 79. In the case of *Mooney v. Cooledge*, 30 Ark. 640, it was held that the extending of a fence over ground used by the plaintiffs and their ancestors as a family burying-place, and giving notice that they would remove, and threatening to remove, the bodies of near relatives and friends, presented a case of irremediable injury justifying the granting of an injunction. In the case of *Webber v. Gage*, 39 N. H. 182, the complainant for more than forty years had owned and occupied a saw-mill and lot, with a way appurtenant thereto and indispensable to their enjoyment, over and across the land of the defendants. The defendants obstructed and destroyed this way by plowing it up and removing a bridge across a brook constituting a part thereof, thereby rendering the mill and lot entirely useless for the purposes to which for more than forty years they had been devoted. The injunction was granted. In *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550, it was held that digging deep holes in the complainant's land, and planting therein large stone pillars or abutments, digging and carrying away large banks of valuable clays therefrom, and constructing an aqueduct by ditches and embankments through and thus permanently dividing the lands, without authority of law, would present a case of irreparable damage. In *Holman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, it was held that a disturbance or deprivation of the right of a riparian owner to the use and enjoyment of a stream of water in its natural state was an irreparable injury for which an injunction would lie. And where the injury is destructive of the substance of the estate, an injunction will be granted, although the title to the property is in litigation. In *Erhardt v. Boaro*, 113 U. S. 539, Mr. Justice Field, delivering the opinion of the court, said: "It is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

REMOVING MINERALS FROM MINES will be restrained on the ground that the injury caused thereby is irreparable, where the minerals constitute the chief value of the property. Such injuries are held to be irreparable, because they are permanently ruinous to the property, and cannot be adequately compensated in damages at law: *Chambers v. Alabama Iron Co.*, 67 Ala. 353;

Henshaw v. Clark, 14 Cal. 460; *McLaughlin v. Kelly*, 22 Id. 211; *Scully v. Rose*, 61 Md. 408; *Althen v. Kelly*, 32 Minn. 280; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Cresap v. Kemble*, 26 W. Va. 603; *Bracken v. Preston*, 1 Pinn. 584; 44 Am. Dec. 412. Said Allen, J., delivering the opinion of the court in *West Point Iron Co. v. Reymert*, 45 N. Y. 705: "Mines, quarries, and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage." But in *Cresap v. Kemble*, 26 W. Va. 603, it was held that an injunction to restrain the taking of coal from an open mine will not be granted when the proof does not show that the coal constituted the chief value of the land.

CUTTING DOWN ORNAMENTAL OR FRUIT-TREES, or timber necessary for the use of a farm, or where the timber constitutes the chief value of the land, will be prevented by injunction, on the ground that these are cases of great and irremediable damage: *Lowndes v. Bettle*, 10 Jur., N. S., 226; 33 L. J. Ch. 451; *Daubenspeck v. Grear*, 18 Cal. 444; *Silva v. Garcia*, 65 Id. 591; *Powell v. Cheshire*, 70 Ga. 357; 48 Am. Rep. 572; *Shipley v. Ritter*, 7 Md. 408; 61 Am. Dec. 371; *Davis v. Reed*, 14 Md. 152; *Scudder v. Trenton D. F. Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756; *Powers v. Heery*, R. M. Charl. 523; *De la Croix v. Villiere*, 11 La. Ann. 39; *Wilson v. City of Mineral Point*, 39 Wis. 160. In the case last cited, Lyon, J., delivering the opinion of the court, said: "No one will seriously contend that a money compensation is an adequate remedy for the loss of trees and shrubbery which the complaint avers the defendants threaten to destroy; and it would be a denial of justice were the courts to refuse the plaintiff the protection he asks, and thus permit his home to be despoiled."

INJURY NOT IRREPARABLE WHEN. — In general, where there is a full, complete, and adequate remedy at law for an injury, it is not irreparable. And if full compensation for an injury can be obtained by damages in an action at law, equity will not apply the extraordinary remedy by injunction: *Brooks v. Diaz*, 35 Ala. 599; *Ex parte Foster*, 11 Ark. 304; *De Witt v. Hays*, 2 Cal. 463; 56 Am. Dec. 352; *Davidson v. Floyd*, 15 Fla. 667; *Anthony v. Brooks*, 5 Ga. 576; *Catching v. Terrell*, 10 Id. 576; *Sullivan v. Hearnden*, 11 Id. 294; *Peterson v. Orr*, 12 Id. 464; *Seymour v. Morgan*, 45 Id. 201; *Fort Clark H. R'y Co. v. Anderson*, 108 Ill. 64; 48 Am. Rep. 545; *Cooper v. Hamilton*, 8 Blackf. 377; *Centreville & A. T. P. Co. v. Barrett*, 2 Ind. 536; *Indianapolis v. Indianapolis etc. Co.*, 29 Id. 245; *Westbrook Mfg. Co. v. Warren*, 77 Me. 437; *Schurmeier v. St. Paul & P. R. R. Co.*, 8 Minn. 113; 83 Am. Dec. 770; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Quackenbush v. Van Riper*, 2 Green's Ch. 350; 29 Am. Dec. 716; *Thorn v. Sweeney*, 12 Nev. 251; *Hart v. Mayor etc. of Albany*, 9 Wend. 571; 24 Am. Dec. 165; *Ross v. Page*, 6 Ohio St. 166; *Mulvany v. Kennedy*, 26 Pa. St. 44; *Richards's Appeal*, 57 Id. 105; 98 Am. Dec. 202; *Brown's Appeal*, 62 Pa. St. 22; *Clark's Appeal*, 62 Id. 447; *Minnig's Appeal*, 82 Id. 373.

The following injuries have been held not to be irreparable: Selling intoxicating liquors on land leased by the plaintiff: *Brooks v. Diaz*, 35 Ala. 599; throwing down fences and letting in cattle upon growing crops: *Catching v. Terrell*, 10 Ga. 576; temporarily interrupting the business of a city horse-railway company by moving a large house along the street over which such company had an exclusive right of way: *Fort Clark H. R'y Co. v. Anderson*, 108 Ill. 64; 48 Am. Rep. 545; using more of the water of a stream than the defendant was legally entitled to, thereby depriving the plaintiff of sufficient water to run his mill, and obliging him to shut down, thus throwing out of employment some two hundred persons: *Westbrook Mfg. Co. v. Warren*,

77 Me. 437; erecting a trestle-work upon which to run a railroad about six feet above the level of the land in front of the plaintiff's property: *Schurmeier v. St. Paul & P. R. R. Co.*, 8 Minn. 113; 83 Am. Dec. 770; throwing water from the defendant's mill-dam upon a small part of several pieces of swamp land belonging to the plaintiff, which had never been productive or brought into use: *Bassett v. Salisbury Mfg Co.*, 47 N. H. 426; constructing a ditch across a rocky, barren, and uncultivated tract of land: *Thorn v. Sweeney*, 12 Nev. 251; cutting ice from a pond: *Marshall v. Peters*, 12 How. Pr. 218; landing passengers from a ferry-boat on the plaintiff's land: *Ross v. Page*, 8 Ohio St. 166; throwing mud on the plaintiff's land: *Mulvaney v. Kennedy*, 26 Pa. St. 44; removing from a hotel a cooking-range and carving-table fastened to the floor: *Clark's Appeal*, 62 Id. 447; cutting turf from a bog: *Sandys v. Murray*, 1 Irish Eq. 29.

In the case of *Blaine v. Brady*, 64 Md. 373, the plaintiff sought an injunction to restrain the defendant from maintaining an embankment, but it was refused. Miller, J., in delivering the opinion of the court, said: "As to the apprehension of future damages, we find no facts stated sufficient to satisfy us that the continuance of this embankment will work irreparable injury to the complainant's farm, or the 'destruction of the inheritance' in the sense in which these terms are used in the authorities. It is not stated how often in the past this stream has overflowed its banks by reason of heavy freshets, nor how much of the complainant's land has been or is liable to be overflowed at such times, in consequence of the embankment made or threatened to be made by the defendant. There is a vague and indefinite statement that a 'considerable portion' of it has been overflowed, but he fails to inform us how much he considers a 'considerable portion,'—whether one acre or ten. He does not say that the land or any part of it has been washed away, and all that we can infer from what he does state amounts simply to this, that when a heavy freshet may happen to occur in this stream the water will, if the embankment complained of remains, overflow a portion of his land, and remain on it till absorbed in the soil or evaporated, and that the crops, if any there be growing thereon at the time, will be destroyed. In our judgment, such occasional overflow of a few acres of land, part of a farm of more than a hundred acres, does not work a destruction of the inheritance, or justify the granting of an injunction in order to prevent irreparable mischief. Such a case seems to us to differ widely and substantially, not only in the facts, but in principle from the destruction of timber which is essential to the use of a farm, the cutting down of trees which afford ornament and shade to a family mansion, the obstruction of a street in a populous city, the diverting of a watercourse from a mill, the digging of ore from a mine, the taking of stones of a peculiar value, or the destruction of an heir-loom or a work of art or a family picture, which has a *pretium affectionis*. We are therefore clearly of opinion the complainant has failed to bring his case within that class of cases in which the extraordinary remedy by injunction ought to be applied."

PLAINTIFF SEEKING INJUNCTION ON GROUND OF IRREPARABLE INJURY must state the facts which go to show that the injury is irreparable. It is not sufficient to state, in general terms, that the injury is irreparable. The question what damage is irreparable is one for the court, and is to be determined from the facts stated by the complainant. Said Merrimon, J., in delivering the opinion of the court in *Frink v. Stewart*, 94 N. C. 486: "It is not sufficient to allege such injury in general terms: it must be done by such specific allegations of facts as will enable the court to see that such injury will or may happen": *De Witt v. Hays*, 2 Cal. 463; 56 Am. Dec. 352; *Waldron*

v. *Marsh*, 5 Cal. 119; *Branch Turnpike Co. v. Supervisors of Yuba Co.*, 13 Id. 190; *Crisman v. Heiderer*, 5 Col. 589; *Bailey v. Simpson*, 57 Ga. 523; *Fort Clark H. R'y Co. v. Anderson*, 108 Ill. 64; 48 Am. Rep. 545; *Amelung v. Seckamp*, 9 Gill & J. 468; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *White v. Flannigan*, 1 Md. 525; 54 Am. Dec. 668; *Blaine v. Brady*, 64 Md. 373; *McKinzie v. Matthews*, 59 Mo. 99; *Tigard v. Moffitt*, 13 Neb. 565; *Thorn v. Sweeney*, 12 Nev. 251; *Frink v. Stewart*, 94 N. C. 484; *Leitham v. Cusick*, 1 Utah, 242; *Schoonover v. Bright*, 24 W. Va. 698; *Cresap v. Kemble*, 28 Id. 603.

FIXTURES, WHAT ARE, AS BETWEEN MORTGAGOR AND MORTGAGEE: See *Rogers v. Prattville Mfg. Co.*, 60 Am. Rep. 171; *Foot v. Gooch*, 60 Id. 411; *Woolford v. Baxter*, 53 Id. 1, note 5; *Thomas v. Davis*, 43 Id. 756; *Hubbell v. East Cambridge Five Cents Savings Bank*, 42 Id. 448, note 447; *Hamilton v. Huntley*, 41 Id. 593; *McKeage v. Hanover F. I. Co.*, 37 Id. 471, note 472; *Globe Marble Mills Co. v. Quinn*, 32 Id. 259; *Jones v. Detroit Chair Co.*, 31 Id. 314; *Adams v. Beadle*, 29 Id. 487; *State Savings Bank v. Kircheval*, 27 Id. 310; *McConnell v. Blood*, 25 Id. 12; *Arnold v. Crowder*, 25 Id. 260; *Ottumwa W. M. Co. v. Hawley*, 24 Id. 719, note 726; *Green v. Phillips*, 21 Id. 323; *Eaves v. Estes*, 15 Id. 345; *Tift v. Horton*, 13 Id. 537; *Pierce v. George*, 11 Id. 310, note 314; *Sowden v. Craig*, 96 Am. Dec. 125; *Daniels v. Bowe*, 95 Id. 797; *Rogers v. Crow*, 93 Id. 299, note 303; *McLaughlin v. Nash*, 92 Id. 741, note 743, where other cases in that series are collected.

CONSTRUCTIVE ANNEXATION OF FIXTURES: See *Peck v. Batchelder*, 94 Am. Dec. 392, note 395, collecting other cases in that series.

ADAMS v. BEALL.

[67 MARYLAND, 58.]

MONEY PAID BY MINOR, IN CONSIDERATION OF HIS BEING ADMITTED AS PARTNER in a business, cannot, on his voluntarily withdrawing from the partnership into which he had actually entered, and in which he had remained for more than a year, be recovered by him, unless he was induced to enter into the partnership by the fraudulent representations of the party to whom he paid the money.

INFANT MAY AVOID CONTRACT OF PERSONAL NATURE, or one relating to personal property, either before or after his majority.

ACTION at law brought by the appellee, an infant, by his next friend, against the appellant. The first and sixth prayers of the plaintiff below, which are referred to in the opinion, are as follows: "1. That if the jury shall find from the evidence that the plaintiff, Beall, passed, delivered, or paid over to the defendant, Adams, on or about the sixth day of July, 1883, the sum of two thousand nine hundred dollars, and that said plaintiff, Beall, was at that time an infant within the age of twenty-one years, and that said money was the property of said Beall, and that said money was so passed, delivered, or paid over by said plaintiff, Beall, to said defendant, Adams, in pursuance of trade, and that said plaintiff, Beall, has de-

manded of said defendant, Adams, said sum of money, and that said defendant, Adams, has neglected, withheld, and refused to pay back, return, and reimburse said plaintiff, Beall, said sum of money, then their verdict must be for the plaintiff, for the said sum so paid by him, less any sum of money which from the evidence the jury may believe the defendant has paid the said plaintiff." "6. That if the jury shall find from the evidence that the plaintiff, Beall, on or about the sixth day of July, 1883, paid over, delivered, or passed to the defendant, Adams, the sum of two thousand nine hundred dollars, and that said plaintiff was at that time an infant under the age of twenty-one years, and that said sum of money was the plaintiff's, and that said sum of money was not paid by said plaintiff to said defendant for necessities furnished by said defendant to said plaintiff, and that said sum of money was paid by said plaintiff to said defendant in pursuance of trade and as consideration of an agreement of partnership between said plaintiff and defendant, of date of July, 1883, and that the payment of said sum of money was not for the benefit of said plaintiff, and that said plaintiff has avoided and rescinded said agreement of partnership within the period of his infancy, and has demanded of said defendant said sum of money, and that said defendant has withheld, neglected, and refused to pay back or return and reimburse said plaintiff said sum of money, then their verdict must be for the plaintiff for the sum of money so paid by him to the defendant, less such sums as shall have been proved to have been paid by the defendant to the plaintiff." The verdict and judgment were for the plaintiff, and the defendant appealed. The other facts are stated in the opinion.

Albert Ritchie, for the appellant.

William Colton, for the appellee.

By Court, ROBINSON, J. The appellee, while a minor, paid to the appellant two thousand nine hundred dollars, as a consideration for being admitted as a partner in the appellant's business. The partnership continued for more than a year, and finding it unprofitable, the appellee, without formally dissolving the partnership, withdrew from the business.

The question in the case is, whether the appellee is entitled to recover of the appellant the money thus paid. His right to disaffirm the partnership contract, and to avoid all liabili-

ties under it, including the partnership debts, is not denied. Being an infant when the contract was made, this is a privilege to which, for his protection, he is entitled. But when he seeks to recover money paid for a consideration which he has enjoyed, or has had the benefit of, this presents quite another question. The two thousand nine hundred dollars was paid to the appellant in consideration of being admitted as a partner in his business. He was admitted as a partner, and continued to be a member of the firm for at least a year. The business was not, it is true, a successful one, but this, in the absence of fraudulent representations on the part of the appellant, cannot affect the question. We are dealing with a contract between an infant and an adult, executed on both sides, and upon the faith of which money was paid by the infant for a consideration which he has enjoyed. The privilege of infancy, says Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1804, was intended as a shield or protection to the infant, and not to be used as the instrument of fraud and injustice to others; and to hold that an infant has the right, not only to withdraw from a partnership at his own pleasure, and to subject the adult partner to the payment of all the partnership debts, but has the right also to recover money paid by him as a consideration for being admitted into the partnership, would be, it seems to us, to extend the privilege beyond any just principles upon which it is founded.

So long ago as *Browner and Wife v. Franklyn*, 4 Gill, 463, it was held that where an infant advances money upon a contract, he cannot disaffirm the contract and recover the money advanced, if he has enjoyed the consideration for which the money was paid. *Holmes v. Blogg*, 8 Taunt. 508, is to the same effect. There the infant paid a sum of money as his share of the consideration for a lease of premises, in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant dissolved the partnership, and brought an action to recover back the money he had paid the lessor for his lease. Gibbs, C. J., said: "He may, it is true, avoid the lease; he may escape the burden of the rent and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it; the law does not enable him to do that."

It is a mistake to suppose that the principle on which this case was decided was either overruled or even questioned in

Corpe v. Overton, 10 Bing. 252. In the latter case, the plaintiff, while an infant, signed an agreement to enter into partnership with the defendant, and to pay him one thousand pounds for a share in the business, and to execute on the first day of January a partnership deed with the usual covenants. He also paid one hundred pounds as a deposit for the fulfillment of his part of the contract. The plaintiff afterwards disaffirmed the partnership contract, and never did in fact become a partner. The suit was brought to recover of the defendant the one hundred pounds paid by the infant as a deposit.

Tindal, C. J., said the case was distinguishable from *Holmes v. Blogg*, *supra*. In that case, the plaintiff and partner occupied the premises from March till June, and the money was paid for something available,—that is, for three months' enjoyment of the premises. "In the present case, the plaintiff has paid to Overton one hundred pounds, for which he has not received the slightest consideration. The money was paid either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. Now, the partnership was not to be entered into till January, 1833, and in the mean while the infant had derived no advantage whatever from the contract."

Bosanquet, J.: "We are far from impeaching the judgment of the court in *Holmes v. Blogg*, as applicable to the facts of that case. . . . Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. . . . The one hundred pounds paid here was in the nature of a deposit. Money paid on a deposit may generally be recovered back, where the contract goes off; and here the contract was defeated before the infant derived any benefit from it."

Alderson and Gaselee, JJ., were of the same opinion.

The plaintiff was allowed to recover the deposit money paid by him while an infant, because the partnership contract was disaffirmed by Corpe before the time agreed upon for it to begin. As was said by Alderson, J.: "Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made."

The distinction between *Holmes v. Blogg* and *Corpe v. Overton*, *supra*, is this: In the former, the plaintiff was not allowed to recover the money paid by him while an infant, because it was paid on a consideration which he had in part enjoyed; while in the latter, the plaintiff was allowed to recover as

upon an entire failure of consideration. Passing, then, from these cases, we come to *Ex parte Taylor*, 8 De Gex, M. & G. 254, which is a case directly in point. There an infant paid a premium on entering into a partnership, and before he came of age disaffirmed the contract, and upon the bankruptcy of the firm attempted to prove for the premium thus paid. Lord Justice Knight Bruce said: "In my opinion, a case of fraud has not been established. That being so, the matter remains one of a contract fairly made, or as fairly made as a contract with an infant could be made,—a contract upon which the infant acted during his minority, and which, during the minority, has been in part performed on each side. In such a state of things, I conceive that if the bankrupts had continued solvent, and an action had been brought against them by the minor, either before or after majority, for the purpose of recovering the money in question, or any part of it, there must have been either a nonsuit or a verdict against him."

Lord Justice Turner said: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot, on attaining his majority, recover the money back."

We have quoted at length from the preceding cases, because the question at issue is an important one, and comes before us for the first time for decision. And whilst fully recognizing the privilege which the law accords to minors in regard to contracts made during their minority, yet in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remains a partner for a given time, he ought not to be allowed to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the appellant.

Whether an infant can avoid a contract and sue thereon during his minority, or must wait until he arrives at age, is a question about which the decisions are conflicting. To hold that he cannot disaffirm a voidable contract until he attains his majority would in many cases work the greatest injustice

to an infant. And where the contract is of a personal nature, or relating to personal property, we see no good reason why such a contract may not be avoided either before or after his majority: *Stafford v. Roof*, 9 Cow. 626; *Shipman v. Horton*, 17 Conn. 481; *Willis v. Twambly*, 13 Mass. 204.

The court having erred in granting the plaintiff's first and sixth prayers, the judgment must be reversed.

Judgment reversed and new trial awarded.

POWER OF INFANT TO AVOID HIS CONTRACT: See *House v. Alexander*, 55 Am. Rep. 189; *Miller v. Smith*, 37 Id. 407; *Turner v. Gaither*, 35 Id. 574; *Shurtleff v. Millard*, 34 Id. 640; *Toley v. Wood*, 25 Id. 27, note 30; *Chandler v. Simmons*, 93 Am. Dec. 117, note 124, where other cases in that series are collected; *Briggs v. McCabe*, 89 Id. 503, note 506, collecting other cases.

INFANT MAY BE PARTNER: See *Penn v. Whitehead*, 94 Am. Dec. 478, note 498.

KING v. WARFIELD.

[67 MARYLAND, 246.]

TO RENDER EXECUTORY CONTRACT VALID, BOTH PARTIES THERETO MUST BE BOUND by it, and no action to recover damages for the non-performance of a contract which is not binding upon both parties can be maintained. Where, therefore, an instrument in writing under seal, purporting to be a lease, provides that it shall not be binding on the lessee in any way until he shall be appointed and installed by the proper officers of a certain railroad company as freight and ticket agent of said company at a particular station, such lessee cannot maintain an action for damages for the non-performance of the contract until he has been so appointed and installed, although he elects that the lease shall be binding upon him, and demands possession of the premises demised.

ACTION for non-performance of a contract. The opinion states the case.

William Brace and B. A. Richmond, for the appellant.

William Kealhofer, J. B. Henderson, and George Peter, for the appellees.

By Court, YELLOTT, J. An instrument of writing under seal, purporting to be a lease, was executed on the sixteenth day of December, 1884, by the parties to this cause. By the terms of this instrument, the appellees leased twenty-one acres of land on the Washington County branch of the Baltimore and Ohio railroad, together with a dwelling-house, and other improvements thereon, to the appellant, for the term of fifteen months from the first day of January, 1885, at the

yearly rent of one thousand dollars, with the privilege of renewing said lease on the same terms after its expiration.

It is, however, expressly agreed between said parties that this lease shall not be binding on the appellant "in any way" until he, the said appellant, shall be "appointed and installed by the proper officers of the Baltimore and Ohio Railroad Company as freight and ticket agent of said company at Breathedsville station, in Washington County, Maryland, on the Washington County branch of the Baltimore and Ohio railroad."

This instrument of writing under seal is set forth in full in the declaration, and the plaintiff then avers that, although he was not appointed by the officers of the said railroad company at the place aforesaid, he elected that said lease should be binding on him, and demanded possession of said demised premises from the defendants, who refused to deliver possession, and in consequence of such refusal he has brought suit for the recovery of damages.

To the declaration the defendants demurred, and the demurrer was ruled good by the court, and final judgment rendered against the plaintiff, and in favor of the defendants for costs. From this judgment an appeal has been taken.

The record discloses the existence of an executory contract. It is said to be an elementary principle that, to render an executory contract valid, both parties must be bound: *Rathbone v. Warren*, 10 Johns. 587.

Now, it will be seen that it is provided in this instrument under seal that "this lease shall not be binding on the said King in any way until the said King shall be appointed to and installed by the proper officers of the Baltimore and Ohio Railroad Company as freight and ticket agent of the said company at Breathedsville station, in Washington County, Maryland, on the Washington County branch of the Baltimore and Ohio railroad." It is thus apparent that the appellant is entirely free from any and all obligations intended to be created by this instrument under seal, until the happening of an event which has not occurred. The question then to be determined is, whether the appellees are bound by a contract during the period, while the other party remains exempt from all obligations, and could not be sued for any alleged infraction. No such principle has ever been sanctioned by adjudication when the terms of the contract impose mutual obligations. On the contrary, this court has said that "it is

certainly necessary to set out in the declaration a contract binding on both parties, when a suit is instituted to recover damages for the non-performance of the contract": *Berry v. Harper*, 4 Gill & J. 470; *Lamar v. McNamee*, 10 Id. 120; 32 Am. Dec. 152.

And in *Routledge v. Grant*, 3 Car. & P. 273, Best, C. J., emphatically says: "It is not just that one party should be bound when the other is not."

It is manifest that this is one of those legal principles so well established as to be beyond the scope of controversy. The proper construction of this executory contract is, that it was to become binding upon both parties when the appellant obtained the appointment he was seeking to obtain. It would become operative as soon as that contingency happened, and not before. As that contingency, which was dependent on the action of third parties, has not happened, the appellant is free from all obligations, and is therefore in no position to maintain a suit against the appellees for an alleged non-performance of a contract by which he is not bound in any respect. He cannot, at his own option, now impose on them obligations not created by the instrument under seal. As was said by Chancellor Johnson in *Duvall v. Myers*, 2 Md. Ch. 405, "a party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character."

There is clearly no error in the ruling of the court below, and its judgment should be affirmed.

Judgment affirmed.

EXECUTORY CONTRACT, TO BE ENFORCEABLE, MUST BE BINDING ON BOTH PARTIES: See *Campbell v. Lambert*, 51 Am. Rep. 1; *Benedict v. Lynch*, 7 Am. Dec. 484, note 492. But a promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee: *Willets v. Sun M. I. Co.*, 6 Am. Rep. 31; *Des Moines V. R. R. Co. v. Graff*, 1 Id. 256; *L'Amoureux v. Gould*, 57 Am. Dec. 524, note 526.

PARKER v. STATE.

[67 MARYLAND, 829.]

THAT PARTY ALLEGED TO HAVE BEEN INJURED MADE COMPLAINT WHILE INJURY WAS RECENT may be proved on the examination in chief in a trial for rape, but the details and circumstances of the transaction cannot be proved on such examination by her declarations.

WHERE COURT, AT BEGINNING OF TRIAL FOR RAPE, ORDERS ALL WITNESSES TO BE EXCLUDED from the court-room, but a material and competent witness for the accused, in disobedience of the order of the court, remains in the court-room during the examination of the witnesses, the court has no right to refuse to allow such witness to testify. A person on trial has the right to prove the truth relating to the accusation against him, by the evidence of all witnesses who have any knowledge of it, and he does not forfeit this right by the misbehavior of a witness.

INDICTMENT for rape. The facts are stated in the opinion.

George C. Merrick and Daniel R. Magruder, for the appellant.

Charles B. Roberts, attorney-general, for the appellee.

By Court, BRYAN, J. The indictment against the prisoner contained two counts. The first charged that he had committed a rape on the person of one Kitty Wills, and the second charged an assault upon her with intent to commit a rape. He was acquitted on the first count and convicted on the second. The case comes before us on two bills of exception taken at the trial.

The first bill of exception states that the prosecuting witness gave evidence tending to show the commission of the offense charged in the indictment by the prisoner on a certain Saturday. There are two offenses charged in the indictment; we presume the offense intended to be designated is the rape, and not the assault with intent to commit it. The mother of the prosecuting witness then testified that on Friday after the Saturday on which the assault was alleged to have been committed, she found her daughter's drawers under certain steps with blood stains upon them. She was then asked this question by the state: "What did the girl, Kitty Wills, say on that occasion was the reason she had hid the drawers?" Objection to the question was overruled by the court, and the witness was permitted to answer it. The answer is thus stated in the bill of exception: "Whereupon the witness in answer stated that the girl, crying all the time, said: 'Now, mother, if you will make me a faithful promise not to whip me, I will tell you the truth about it. Uncle Tom Parker took me up in

his arms, and threw me down on the ground, pulled up my clothes, and put something in me sharp like a knife, and made me cry; when I got up I said I was going back home and tell my mamma, and he said if I did he would kill me and throw me in the river, and run for his life; he told me to hide the drawers, and if you said anything about them, to tell you to come to him.'” It would have been competent to prove on the examination in chief that the party alleged to have been injured made complaint while the injury was recent; but the details and circumstances of the transaction cannot be proved on such examination by her declarations: 1 Greenl. Ev., sec. 102. The offer now under consideration was an attempt to prove by her declarations that she had hidden her drawers, and show her motive for hiding them. When an outrage has been committed on a woman, the instincts of her nature prompt her to make her wrongs known, and to seek sympathy and assistance. The complaint which she then makes is the natural expression of her feelings. It may therefore be shown in evidence as a circumstance which would usually and probably have occurred in case the offense had been committed. But the evidence which the court admitted is not of this nature. It is simply hearsay,—a narration of a past event, and not the language of any emotion caused by the supposed occurrence.

At the beginning of the trial, the court ordered that the witnesses on both sides should be excluded from the court-room. It appeared that one Mary Edelin, a material and competent witness for the traverser, in disobedience of the court's order, had remained in the court-room during the examination of the witnesses. The court, for this reason, refused to permit her to testify. It was in the discretion of the court to order the witnesses to leave the court-room; but it is not reasonable to take away from a prisoner on trial the benefit of testimony on which his life may depend, because of the misconduct of another person.

The humanity of the law is shocked at the punishment of the innocent. It provides with the greatest solicitude that persons accused of crimes shall have fair and impartial trials. The object is considered of sufficient importance to be guaranteed by the solemn and impressive declarations of our organic law. The scheme and theory of our legal system seek to provide that no man shall be adjudged guilty unless the truth of the matter charged upon him has been established after a fair and full investigation. The ascertainment of the truth is the

great end and object of all the proceedings in a judicial trial. But this object is pursued by general rules which experience has shown to be useful in guarding against erroneous conclusions. By the operation of these general rules, certain well-defined classes of persons are forbidden to testify. Subject to these well-known and distinctly marked exceptions, a person on trial has the right to prove the truth relating to the accusation against him by the evidence of all witnesses who have any knowledge of it. And they are compelled to attend and deliver their testimony in his behalf. Since such great care has been taken to secure the right of an accused person to prove the truth relating to the accusation against him, it would be very strange if he should forfeit this most precious privilege by the misbehavior of a witness. Authorities were cited at the bar for the purpose of showing that in some jurisdictions it was within the discretion of the judge to refuse to permit a witness to testify under the circumstances stated in the second exception. If the evidence of such witness would show the innocence of a prisoner on trial for his life, then the discretion of the judge to admit or reject the testimony amounts to a discretion to take the prisoner's life, or to spare it. The wise, just, and merciful provisions of our criminal law do not place human life on such an uncertain tenure. A man's life and liberty are protected by fixed rules prescribed by the law of the land, and are not enjoyed at the discretionary forbearance of any tribunal. All suggestions of this kind are alien to the spirit and genius of our jurisprudence.

Rulings reversed, and new trial ordered.

DETAILS OF COMPLAINT BY PROSECUTRIX ARE NOT ADMISSIBLE IN CHIEF IN TRIAL FOR RAPE: See *State v. Robertson*, 58 Am. Rep. 201; *People v. Mayes*, 56 Id. 126; *Oleson v. State*, 38 Id. 366, note 369, where this subject is discussed; *Hornbeck v. State*, 35 Id. 608; note to *Smith v. State*, 80 Am. Dec. 371; *Laughlin v. State*, 51 Id. 444; *Phillips v. State*, 49 Id. 709. *Contra: Benetline v. State*, 31 Am. Rep. 593; *State v. Kinney*, 26 Id. 436; *State v. De Wolf*, 20 Am. Dec. 90.

EVIDENCE OF WITNESS WHO DISOBEYS ORDER OF EXCLUSION OUGHT NOT TO BE REJECTED: See *State v. Thomas*, 60 Am. Rep. 720. In *Laughlin v. State*, 51 Am. Dec. 444, it was held to rest in the discretion of the court to receive the testimony of such a witness. In *Keith v. Wilson*, 35 Id. 443, it was held that where the disobedience of the order was unintentional, the testimony should not be rejected. In *Schneider v. Haas*, 58 Am. Rep. 296, it was held that a statute providing that the judge may exclude any witness of the adverse party does not authorize the exclusion of a party to the cause.

PHILADELPHIA, WILMINGTON, AND BALTIMORE R. R.
CO. v. FRONK.

[67 MARYLAND, 339.]

FAILURE TO RING BELL OR BLOW WHISTLE OF LOCOMOTIVE AT PRIVATE CROSSING in the open country, guarded by gates on either side, where there is no station for passengers or freight, nor any side-track, and where no trains ever stopped; where for more than twenty years no whistle had ever been sounded, nor whistling-post put up, nor any request therefor made by the owners of the property entitled to use the crossing; and where the line of the railroad on either side is nearly straight, — is not evidence of negligence on the part of the railroad company to go to the jury.

ACTION for damages. The opinion states the case.

William J. Jones and Alexander Evans, for the appellant.

Albert Constable, for the appellee.

By Court, MILLER, J. At the close of the testimony, the defendant company asked the court to instruct the jury that there was no evidence legally sufficient to show that the plaintiff was injured by its negligence or that of its agents, and he cannot therefore recover.

There can be no serious controversy as to the legal principles applicable to a case like this. The *onus* of proving that the injury was caused by the negligence of the company is on the plaintiff, and if there be no evidence legally sufficient for that purpose, the action must fail. It has been so often decided by the appellate court of this state that the legal sufficiency of evidence is a question of law for the court that it is useless to cite the decisions, and such is the settled law in every state of the Union as well as in England. As was said by Lord Chancellor Cairns in a similar case, *Metropolitan R'y Co. v. Jackson*, L. R. 3 App. C. 197: "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether from these facts, when submitted to them, negligence ought to be inferred, and it is of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may be reasonably inferred, the judge were to withdraw the case from the jury upon the ground

that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: A company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the court in bank, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial; and on a second trial, and even on subsequent trials, the same thing might happen again."

This accident happened on the 30th of May, 1885, about nine o'clock in the morning, while the plaintiff was driving an empty two-horse wagon, rigged for carrying charcoal, across the railroad tracks. The train which struck the wagon was the morning express passenger train from Baltimore to Philadelphia. This train stopped but twice between the two cities, was running at the rate of fifty or fifty-five miles per hour, and we think it clear that, unless the failure of those in charge of it to whistle or ring the bell when the train approached the place of the accident was evidence to go to the jury upon the question of negligence on their part, there was no evidence whatever to sustain the action. What, then, is the proof on this subject?

The crossing where the accident occurred was undoubtedly a private farm-crossing, and not a public highway. The farm was a large one lying between the county road and the river, and, as usual, there was a private lane or road from the county road to the farm-house for the convenience of the owners of the property. When the railroad was originally located and constructed, it passed between the barn and the house, across this private lane, and the company placed planks between the rails on their tracks for the accommodation of those using the crossing, and presumably, also, for the protection of their rails. Gates were erected across this lane on both sides of the track,

which were usually kept closed. There was also a gate at the county road, also closed, but in late years it seems to have been left open. Formerly, and for a short period, there was a fishery on the river shore, and the way to it was down this lane, which was generally used during the fishing season by persons going there. But this was more than fifteen years ago, and the farmer who then and now lives in the farm-house says that after 1871 "it was used only by me, and persons coming to see me." In short, there is no proof that (other than for this brief period, prior to 1871) this road has ever been used by any other person than the owners of the property and their employees, and for their private and exclusive purposes.

The McCullough Iron Company bought the whole farm in February, 1884, and in the following spring put up works for burning charcoal on that part of it which lies south of the railroad. They used this lane in hauling materials from the county road for the construction of these works. They commenced burning charcoal in September, 1884, and hauled it through this lane to the county road, and thence to their furnaces at the village of North East. This, of course, occasioned an increased use of the lane and crossing, but it was still a private lane and a private crossing. The proof is clear and uncontradicted that since the purchase of the farm by this company, and the construction of these works, the lane "was used only by people going to their works and to their farm buildings." One of the witnesses says that after the works were put up and there was so much hauling, he told "one of the officers of the iron company that the railroad company had never blown any whistle at this crossing, and that he ought to have the railroad company put a whistling-post there, or some one would be killed there some day." But no request for a whistling-post was ever made, nor is there any proof that the extent of the increase of the use of the crossing by reason of this hauling was ever, prior to this accident, brought to the knowledge of any of the general officers of the company, or to any of its agents or employees engaged in the running of its passenger trains.

The fact that no whistle had ever been sounded for this crossing is conceded. Indeed, the plaintiff himself says he knew this when he attempted to cross the tracks, and that he also knew that the train was then due. The engine-man in charge of the locomotive, and who had been running over it daily for

more than twenty years, says he always supposed it was a farmer's private crossing; that he knew there were gates there, but cannot say whether they were shut on this occasion or not; that he never saw any one on the crossing before; that he has seen the gates shut and cattle in the lane, and has also seen wagons standing below the crossing, and supposed it was used for the charcoal-works; that his orders were to whistle at posts, and at other times, for danger. It also appears there was no fault on his part or that of his fireman in not keeping a proper lookout for persons on the track or for danger, and that as soon as he discovered the dangerous position of the wagon, he did everything practicable to avoid the collision. The train was running at a high but not unusual rate of speed for express passenger trains between large cities. It was cloudy, smoky, and foggy on the morning of the accident, so that the view of an approaching train was not so good as in clear weather, but there was no sharp curve in the line of the road as it approached this crossing, and the engine-man had the right to assume that any one attempting to use it in such a state of the atmosphere would not do so without first ascertaining that his train had passed, or was so far distant as to make the crossing absolutely safe. Besides, such a state—cloudy, foggy, and smoky weather—must, in the nature of things, have often occurred before.

These are what we find to be the undisputed facts. It is therefore the case of a private crossing in the open country, guarded by gates on either side, where there was no station for passengers or freight, nor any side-track, and where no trains ever stopped; where for more than twenty years no whistle had ever been sounded, nor whistling-post put up, nor any request therefor made by the owners of the property entitled to use the crossing; and where the line of the railroad on either side was nearly straight. In many of the states, as well as in this, statutes have been passed requiring railroad companies to have flagmen at grade-crossings, or to whistle or give other signals at such places, but in every instance brought to our attention they relate to public crossings. No statute that we are aware of has ever made such a requirement in the case of a private farm-crossing in the open country and not near to any village or city.

Nor have we found or been referred to any case, either in this country or in England, in which it has been decided that the failure to whistle at a crossing like this is evidence to go

to the jury of culpable negligence on the part of a railway company. Counsel for the appellee has cited a large number of cases, but they all differ widely in their circumstances from this. One case specially relied on (and it illustrates all the others) is that of *Barry v. New York etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377. In that case, a boy ten years of age was killed while crossing the defendant's track, in the city of Troy, at a place where the public had been in the habit of crossing for more than thirty years, and where several hundred persons crossed daily, with the knowledge and acquiescence of the company. The train which inflicted the injury was backing up without ringing a bell, or giving any other signal of its approach, in charge of a brakeman who was standing on a platform between two cars, where he could not see persons on the track, or have notice to apply the brakes in case of danger; and there can, we think, be no doubt as to the correctness of the court's decision that the evidence in that case justified the submission of the question of the defendant's negligence to the jury. A case decided by the house of lords, *Dublin, Wicklow, and Wexford R'y Co. v. Slattery*, L. R. 3 App. C. 1155, was also relied on. There the accident occurred at night, and at a way-station on the road. The party had crossed the tracks to purchase his ticket, and on his way back was caught and killed by an express train. It was a rule of the railway that the express trains should always sound a whistle on approaching this station. The defendant's witnesses swore that the whistle was sounded, but several witnesses for the plaintiff swore they did not hear it, though they were standing in a position in which they could have heard it if it had been sounded. In this state of conflicting proof, the question of negligence was left to the jury, and this ruling was affirmed by a majority of the house of lords.

These are the strongest cases cited by counsel, and the difference between them and the case at bar is too obvious to need comment. More like it, but not more strong for the defendant company, is our own case of *Northern Central R'y Co. v. State, Use of Burns*, 54 Md. 115. The proof in that case was that Mrs. Burns was killed while crossing the tracks near Woodberry, at a place where many pedestrians, going to and from Baltimore, were accustomed to cross. On one side of the tracks was the gate of a public park, which these pedestrians used; and on the other a foot-bridge over the stream to the Woodberry mills, which they also used. There was, however,

no public roadway there, nor any planks convenient for crossing; but there was a path on each side of the railroad. She was struck by a train going to Baltimore, and the road approached the place on a curve. The ground upon which negligence was imputed to the company was, that no bell was rung or whistle sounded when the train approached the place of the accident. The proof on this subject was, that it was not customary to give any such signals at that place, unless some one was seen on or approaching the railway. The court described the place as being in the "open country," and held that "there was no obligation on the part of the company to give the signals spoken of, and negligence cannot be imputed to the defendant if they were not given"; and that it was error to submit the case to the jury upon the undisputed facts disclosed by the proof. They said that the plaintiff had failed to offer any evidence whatever of negligence on the part of defendant's agents in charge of the train whereby the accident was caused, and reversed the judgment.

Upon a careful consideration of the facts proved (and about which there is no dispute), we have reached the same conclusion in this case. In our opinion, the defendant's first prayer should have been granted. This is conclusive of the case, and it becomes unnecessary to consider the defense of contributory negligence on the part of the plaintiff, or any other question argued at bar.

Judgment reversed.

OBLIGATION OF RAILROAD COMPANY TO GIVE WARNING AT CROSSINGS: See *Byrne v. New York etc. R. R. Co.*, 58 Am. Rep. 512; *Ransom v. Chicago etc. R'y Co.*, 51 Id. 718; *Chicago etc. R. R. Co. v. Boggs*, 51 Id. 761; *Berry v. New York etc. R. R. Co.*, 44 Id. 377; *Louisville etc. R. R. Co. v. Commonwealth*, 26 Id. 205, note 207; *Pennsylvania R. R. Co. v. Weber*, 18 Id. 407; *Cleveland etc. R. R. Co. v. Crawford*, 15 Id. 633; *Bellefontaine R'y Co. v. Hunter*, 5 Id. 201, note 216; *Pennsylvania R. R. Co. v. Barnett*, 98 Am. Dec. 346, note 350, where other cases in that series are collected.

DUTY OF PERSON CROSSING RAILROAD TO LOOK OUT FOR TRAIN: See *Ormesbee v. Boston etc. R. R. Co.*, 51 Am. Rep. 354, note 360; *Pennsylvania R. R. Co. v. Weber*, 18 Id. 407; *Cleveland etc. R. R. Co. v. Crawford*, 15 Id. 633; *Pennsylvania R. R. Co. v. Beale*, 13 Id. 753; *Bellefontaine R'y Co. v. Hunter*, 5 Id. 201; *Gonzales v. New York etc. R. R. Co.*, 98 Am. Dec. 58, note 60, where other cases in that series are collected.

EMMITTSBURG RAILROAD COMPANY v. DONOGHUE.

[67 MARYLAND, 338.]

AGREEMENT BY HOLDER OF SINGLE BILL TO RELINQUISH CLAIM TO INTEREST which had accrued thereon, and to accept the payment of the principal in full satisfaction of the debt, is without consideration, and the debt is not discharged.

IN ACTION TO RECOVER INTEREST DUE ON SINGLE BILL, plea that defendant owed plaintiff the single bill and another debt, the amount of which was in dispute, and that in performance of an agreement with the plaintiff the defendant paid the face of the bill, and also the amount of the other debt as claimed by the plaintiff, without further dispute or delay, and that these payments were accepted by the plaintiff in full settlement of his claims, is not a sufficient defense to the action.

ACTION to recover the amount of interest alleged to be due on a single bill. The opinion states the case.

James McSherry, for the appellant.

Eugene L. Rowe, for the appellee.

By Court, BRYAN, J. To an action on a single bill, the defendant pleaded six pleas. The third and sixth were held bad on demurrer.

The third plea avers, in substance, that it was agreed between the plaintiff and the defendant that if the plaintiff would relinquish all claim to the interest which had accrued on the principal sum due, the defendant would pay said principal in full satisfaction of the debt, and that in accordance with the agreement the defendant did pay said principal sum, and the plaintiff thereupon surrendered to him the writing obligatory. The interest was as much a part of the debt as the principal, and it was necessary that an agreement to waive it should be sustained by a valuable consideration. The agreement was simply a contract to pay a portion of the sum due in satisfaction of the whole. A debt cannot be discharged in this way: *Jones v. Ricketts*, 7 Md. 116, and many other cases.

The substance of the sixth plea was that the defendant owed the plaintiff the single bill in question, and also another debt, the amount of which was in dispute, and that in fulfillment of an agreement with the plaintiff he paid the amount of the single bill without interest (or, as stated in the words of the plea, the face of the bill), and also the amount of the other debt as claimed by the plaintiff, without further or other dispute in regard to the last-mentioned debt, and without further delay as to the single bill, and that these payments

were accepted by the plaintiff in full settlement of his claim. We do not see that the statements in the plea show any consideration for giving up the interest due on the single bill. They show the payment of another debt; if the defendant paid no more than was due on this other debt, he gave nothing that would be a consideration in the view of the law. It is not alleged that more was paid than was justly due. It is undoubtedly true that the compromise of a doubtful claim is a valuable consideration. The prevention of litigation is an object highly favored by the law. If there had been a controversy about this second claim, of which the issue was considered by both parties doubtful, the payment of the claim in full would have been a valuable consideration: 1 Parsons on Contracts, 469.

It is not averred in the plea that the amount due was doubtful, and that to prevent litigation respecting it this settlement was made. Merely stating that the amount was in dispute is a very different thing. In *Edwards v. Baugh*, 11 Mees. & W. 641, Lord Abinger's remarks are very apposite. "The declaration alleges that certain disputes and controversies were pending between the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word 'controversy' to render this a good allegation of consideration. The controversy merely is, that the plaintiff claims the debt, and the other denies it." In Addison on Contracts, page 11, in a note, we find these passages: "But if the rights of a claimant are doubtful, and are honestly contested, an agreement on the part of the debtor to pay something, and on claimant's part to accept that in full, is valid, so far, at least, as the element of consideration is concerned." "Thus when a creditor and his debtor entertain doubts of the validity of the debt, and make an honest compromise of it, a note given by the debtor for the compromise sum agreed on cannot be contested as lacking consideration." And a large number of authorities are cited. On page 12 it is thus stated: "But unless the debt is unliquidated, or some doubt exists as to the exact amount due, a promise by the creditor to discharge the residue on receiving payment of part is *nudum pactum*, and totally inoperative, because the debtor is under a legal obligation to pay the whole demand." In our view of the case, this plea is not a sufficient defense to the action.

Judgment affirmed.

WHETHER PAYMENT OF LESS SUM DISCHARGES DEBT: See *Neal v. Handley*, 56 Am. Rep. 784; *Gordon v. Moore*, 51 Id. 606; *Weber v. Couch*, 45 Id. 274; *Schweider v. Lang*, 43 Id. 202; *Mitchell v. Wheaton*, 33 Id. 24; *Luddington v. Bell*, 33 Id. 601; *Kromer v. Heim*, 31 Id. 491; *Young v. Jones*, 18 Id. 279; *Savage v. Everman*, 10 Id. 676; *Marvin v. Treat*, 9 Id. 307; *Draper v. Hitt*, 5 Id. 292; *Diller v. Brubaker*, 91 Am. Dec. 177; *Deland v. Hiatt*, 87 Id. 102; *Hearn v. Kiehl*, 80 Id. 472; *McDaniels v. Bank of Rutland*, 70 Id. 406; *Rose v. Hall*, 68 Id. 402; *Leavitt v. Morrow*, 67 Id. 334; *Jones v. Perkins*, 64 Id. 136, note 138, where this subject is discussed at length.

FIREMEN'S INSURANCE CO. OF BALTIMORE v. FLOSS.

[67 MARYLAND, 408.]

IN SUIT ON CONTRACT WITH PARTNERSHIP, IT MUST APPEAR THAT ALL WHO SUE WERE PARTNERS at the time of making the contract. One who has been subsequently admitted as a partner cannot join in the action, although it was agreed, as between the partners themselves, that he should become equally interested with the others in all the existing property and rights of the firm, unless there has been, after the accession of the incoming partner, a new and binding promise to pay to the firm as newly constituted. And this principle applies with great strictness where the contract is by specialty.

WHERE POLICY OF INSURANCE, CONTAINING COVENANT THAT INSURANCE SHOULD CONTINUE and be in force from the expiration of the time mentioned therein for its duration so long as the insured or their assigns should continue to pay the like premium, provided such premium were actually paid to the company and indorsed on the policy, or a receipt given therefor by the company, is issued under seal to a firm then composed of two members, but to which a third member is afterwards admitted without change in the name of the firm, and the firm so constituted continues to pay the premium as covenanted in the policy, taking renewal receipts therefor not under seal, upon the happening of a loss, the firm as constituted at the date of the renewal receipt cannot maintain an action of *assumpsit* thereon. But such firm, so constituted, may maintain such an action on another renewal receipt given by the same company, where the policy issued to the firm before the admission of the new partner contained no covenant for its extension from year to year, but expressly declared that the insurance should continue for the term of one year, and no longer. And want of notice to the insurance company of the change in the firm cannot affect the right to recover in that case.

INSURANCE COMPANY WILL BE REGARDED AS HAVING WAIVED OBJECTIONS TO PRELIMINARY PROOFS of loss, if it withholds or fails to disclose such objections beyond a reasonable time after such proofs are furnished, or if its refusal to recognize the obligation to pay is placed by it upon other and distinct grounds than alleged defects in the preliminary proofs.

ASSUMPSIT. The opinion states the case.

John H. Thomas and George H. Williams, for the appellant.
Thomas W. Hall, for the appellees.

By Court, ALVEY, C. J. The two appeals, though in separate records, by and against the same parties, were argued together, and they will be considered together, as the records in both cases present substantially the same state of facts, and upon which the same questions were raised in the court below.

The plaintiffs below, the appellees here, constituting a partnership under the name of S. W. Floss & Co., composed of Simon W. Floss, Henry M. Adler, and Benjamin Cohen, and being the holders of two policies of fire insurance, issued by the defendants, the present appellants, sued the latter in two several actions of *assumpsit*, upon two several renewal receipts; by which receipts, as it is alleged, new contracts of insurance were made, subject to the same terms and conditions as the original contracts of insurance stated in the policies. Both policies were issued under the corporate seal of the defendants, but the renewal receipts for premiums paid were not under seal.

The first policy, No. 49,730, was issued on the 16th of April, 1877; and the second, No. 51,716, was issued on the 15th of April, 1878. The policies were each for an insurance of \$2,500 on a stock of goods for one year. Other policies in other companies were held on the same stock of goods at the time of the fire, which occurred on the 30th of April, 1886; the aggregate amount of all the insurance being about \$75,000. The total amount of loss, according to estimate, was \$98,265.58. Notice and preliminary proofs of loss were furnished by the plaintiffs to the defendants on the 8th of May, 1886. The defendants refused payment, and the plaintiffs brought these actions.

The cases were tried on pleas of "never promised as alleged," "never indebted as alleged," and some others, alleging fraud and failure to furnish legal preliminary proofs of loss, such as required by the conditions of the policies.

On the trial, the policies, with the several annual renewal receipts attached thereto, were read in evidence. The last of such receipts attached to policy No. 49,730 is dated April 16, 1886, and the last attached to policy No. 51,716 is dated April 21, 1886. It was then admitted that, at the date of the policies, the firm of S. W. Floss and Company consisted of S. W. Floss and Henry M. Adler, and that it was not until the 13th of January, 1882, that Benjamin Cohen became a member of the firm, and that he has continued a member

ever since. The preliminary proofs of loss, furnished by the plaintiffs, were called for by them and put in evidence.

In both cases, at the close of the evidence, the defendants submitted two propositions for instruction to the jury: 1. That there was no sufficient evidence of any contract between the defendants and the plaintiff, Benjamin Cohen, as one of the members of the firm of S. W. Floss and Company, to entitle the plaintiffs to maintain the action, and that the verdict should be for the defendants; 2. That there was no sufficient evidence that the conditions of the policy, in respect to preliminary proofs of loss, were complied with before the institution of the suit, or that the defendants had waived the right to object to such non-compliance.

1. Policy No. 49,730 contains a covenant of the defendants for the payment of the amount insured, if the loss or damage insured against was sustained within the term of one year from the date of the policy, which would expire at noon on the 16th of April, 1878; and the defendants further covenanted, promised, and agreed to and with the assured, their executors, administrators, and assigns, "that this insurance shall continue and be in force from the expiration of the time before mentioned for its duration, so long as the said assured, or their assigns, shall continue to pay the like premium as hath been paid for this insurance, and so long as this corporation shall agree to accept and actually receive the same from the assured or their assigns; provided, that a premium for a continuance of the insurance shall be actually paid by the assured or their assigns to this corporation before the day limited for the termination of the risk, and such payment indorsed on this policy, or a receipt therefor given by this corporation."

The insurance was regularly continued by the annual payments of such premiums as the defendants thought proper to demand, and renewal receipts were given as required by the policy. All the receipts are in the same form, and the last given reads thus: —

"BALTIMORE, April 16, 1886.

"Renewal receipt for policy No. 49,730. Subject to conditions therein.

"Received fifteen dollars from S. W. Floss & Co., being the premium on two thousand five hundred dollars, on merchandise (as per policy) situate at 318 West Baltimore Street, insured by the Firemen's Insurance Company, which is hereby continued in force, and will terminate at twelve o'clock, noon, on the sixteenth day of April, 1887."

This receipt was regularly signed by the clerk of the company, though not under seal.

It is an established principle that where the action is by several plaintiffs they must prove either an express contract by the defendants with them all, or the joint interest of all in the subject of the suit. If the contract be with a partnership, it must appear that all who sue were partners at the time of making the contract; for one who has been subsequently admitted as a partner cannot join in the action, though it were agreed, as between the partners themselves, that he should become equally interested with the others in all the existing property and rights of the firm; unless, after the accession of the incoming partner, there has been a new and binding promise to pay to the firm as newly constituted: *Wilsford v. Wood*, 1 Esp. 182, 183; *Ord v. Portal*, 3 Camp. 239, note; *Ege v. Kyle*, 2 Watts, 222; *McGregor v. Cleveland*, 5 Wend. 475; 2 Greenl. Ev., sec. 478. And this principle applies with great strictness where the contract is by specialty; for no one can be joined in an action thereon as plaintiff who is not a party thereto, or the representative of such party. The question therefore is, whether the policy No. 49,730, executed by the defendants under seal, and to which Cohen was not a party, constitutes the contract of insurance, existing at the time of the loss; or whether the last payment of premium, and the renewal receipt, constitute a new contract of insurance not under seal, and to which Cohen was a party, with reference to the previous policy for the purpose only of making such new contract subject to the terms and conditions set out in such policy. If the policy has been continued, or attempted to be continued, as the subsisting contract of insurance, Cohen, not being a party thereto, could not be joined in the action as co-plaintiff; nor could *assumpsit* be maintained by the partnership, as it existed at the date of the policy, for the loss sustained. And looking to the terms of the covenant in the policy, providing for the continuance or extension of the original contract of insurance, and keeping the policy in force, we are of opinion that this action cannot be sustained.

This case, so far as the right to maintain the action is concerned, is not distinguishable from the case of *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47. In that case, the policy under seal was for one year from its date, and contained a precisely similar covenant for the continuance in force of the insurance, from the expiration of that time, as that contained in policy

No. 49,730, which we have recited. The renewal receipt was also in substantially the same terms as the renewal receipts attached to the policy here. There, at the date of the policy, the firm of J. McGowan and Sons consisted of three persons, and at the date of the renewal receipt it consisted of only two, one of the members having in the mean time retired, and it was held by this court that the renewal receipt, taken under the covenant in the policy, was not a parol new contract of insurance with the remaining members of the firm, upon which an action of *assumpsit* could be brought; but that the covenant in the policy contemplated the continuance or extension of the contract of insurance from year to year, as a specialty, and not as a parol new contract of insurance, to be evidenced by the renewal receipt; and therefore an action of *assumpsit* could not be maintained. That is exactly the case here, with the difference only that in *McGowan's Case, supra*, a member of the firm had retired without change in the name of the firm, while in this case, before the last renewal, there had been an accession of a new member, without a change in the name of the firm; so that neither in *McGowan's Case, supra*, nor in this, were the members of the partnership the same at the time of the last renewal as when the policy was issued. It is, however, very clear that all the renewal receipts attached to the policy were given and accepted under the covenant in the policy, and with a view to a continuation or extension of the original contract of insurance, as therein set forth. This is so expressly declared on the face of the receipts, and it was with that understanding, and with a view to such being the case, that the plaintiffs made up and furnished their preliminary proofs of loss. There was, therefore, no new contract entered into by paying the premiums and taking the renewal receipts. That was the construction in the *McGowan Case, supra*, and that decision has been recognized as a binding authority in subsequent cases in this court: *Mutual Fire Ins. Co. v. Deale*, 18 Md. 52; 79 Am. Dec. 673; *Shertzer v. Mutual Fire Ins. Co.*, 46 Md. 510. And such being the case, it follows that there was error in refusing to grant the defendant's first prayer, in the case based upon the renewal receipt attached to policy No. 49,730.

The other case, brought upon the last annual renewal receipt attached to policy No. 51,716, as a parol contract of insurance, is governed by a different principle from that of the preceding case. Here the original policy contains no such

covenant for extension from year to year as that contained in policy No. 49,730. The policy simply provides that the insurance should continue for the term of one year from its date, and expressly declares that it should continue no longer. The policy, therefore, as a specialty, did not admit of a continuation or extension from year to year, by any mere parol contract. The renewal receipts attached are all in the same form, and refer to the policy by number, and declare on their face that the insurance was thereby continued in force for the ensuing year. But these receipts, not being under seal, could not have the effect of re-executing the policy, and continuing it in force as a specialty, for the several periods covered by the receipts. The receipts must be taken as evidence of new parol contracts for insurance, made with reference to the pre-existing policy, and subject to the terms and conditions therein contained. Such receipts are both contracts and receipts; and so far as they are treated as contracts, they are regarded as having been made upon the same consideration and representation as the original contract, embraced in the policy referred to; and wherever any changes are intended to be made in the terms or conditions of the original contract, such changes should be expressed in the renewal receipt. This is the principle as settled by numerous cases upon the subject, and this court has fully recognized that principle in the cases of *Mutual Fire Ins. Co. v. Deale*, 18 Md. 52; 79 Am. Dec. 673; and *Shertzer v. Mutual Fire Ins. Co.*, 46 Md. 510.

It is insisted, however, that the defendants should not be held bound, even though the contract is evidenced by the renewal receipt, and therefore to be treated as a parol contract of insurance, because of the want of notice of the fact that the firm of the plaintiffs had been changed by the introduction of Cohen as a partner since the issuance of the original policy. But to this we cannot accede. We know of no principle that requires, or authoritative case that holds, that notice in such case should be shown as a condition upon which the plaintiffs could recover. It is not shown nor pretended that there was any misrepresentation on the part of the plaintiffs as to the membership of the firm; nor is it pretended that the defendants were misled or deceived in any respect in regard to the composition of the partnership. The parol contract of insurance sued upon was made with the firm of S. W. Floss & Co., and that partnership name represented all the mem-

bers of the partnership at the date of the contract; and the defendants must be taken to have contracted with the partnership as then constituted. Any other principle would lead to the greatest uncertainty and difficulty in the dealings as between the partnership and third parties. Moreover, by the terms of the original contract, to which the subsequent parol contract is made subject, assignment of that contract, or of an interest therein, was permissible, with the consent of the insurance company; and the new parol contract made with the existing partnership for a continuance of the risk must be construed as consent given on the part of the defendants to accept Cohen, the incoming partner, as one of the assured. In this case, therefore, the court below was correct in refusing the first prayer of the defendants.

2. The next question raised relates to the preliminary proofs of loss, alleged to be defective for non-compliance with the requirements of the contract. The statement of particulars of loss were signed and sworn to by Adler alone, one of the firm, the other two partners failing to sign or swear to such statement. By one of the conditions of the policies in these cases, parties insured are required to render to the company within a reasonable time a full and particular account of their loss, and such statement "to be signed by their own hands, and verified by their oath or affirmation." Whether this provision requires, in all cases and under all circumstances, each and every person interested in a loss, covered by the policy, to sign and swear to the preliminary statement of loss, is a question not free of difficulty, but which we need not decide in this case; as we are clearly of opinion that the right to take advantage of any defects or irregularities in such preliminary statement or proofs of loss has been waived by the defendants. The fire occurred on the 30th of April, and the statement of loss was furnished on the 8th of May following. The receipt of this statement of loss was acknowledged by the defendants by letter dated the 29th of May, 1886, in which the plaintiffs were informed that the company was not then prepared to say whether the statement was satisfactory, or if unsatisfactory, in what respect. It is not shown that any objection whatever was ever taken, before suit brought, to the statement for what are alleged as defects therein. But, on the contrary, the refusal to pay was placed on totally different ground. So late as July 12th, Adler, one of the plaintiffs, called upon the president of the defendant

company, and demanded payment of the amount alleged to be due, when he was informed by the president that the company would not pay, because, as he declared, the loss was unquestionably occasioned by an incendiary fire. If defect in preliminary proof had been made the ground of objection to payment, the supposed defect should have been pointed out, so that the plaintiffs could have had an opportunity to make the necessary correction.

Good faith requires of an insurance company frank and open dealing with the assured, and if there be any withholding or failure to disclose objections to preliminary proofs, beyond a reasonable time after they are furnished, or if refusal to recognize the obligation to pay be placed upon other and distinct grounds than alleged defects in preliminary proofs, the company will be regarded as having waived all objection that could otherwise have been taken to such preliminary proofs as furnished. Here the failure to make known the objection, notwithstanding the lapse of time; the fact that the defendants had themselves, with others, instituted an investigation into the circumstances and extent of the loss; and the placing the refusal to pay upon other and distinct grounds than the want of sufficient preliminary proofs,—furnish the amplest ground for holding all objection to such proofs to have been waived by the defendants. If authorities for this proposition be needed, it is only necessary to refer to *Allegre v. Md. Ins. Co.*, 6 Har. & J. 408, 412, 413; 14 Am. Dec. 289; *Fred. Co. Mut. Ins. Co. v. Deford*, 38 Md. 404; *Rokes v. Amazon Ins. Co.*, 51 Id. 520; 34 Am. Rep. 323; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 482; May on Insurance, 2d ed., secs. 468, 469. It is therefore clear the court below committed no error in refusing to grant the second prayer of the defendants.

Upon the whole, the result is, that the judgment of the court below in the case No. 21, on the docket of this court, must be affirmed; and the judgment of the court below in the case No. 22, on said docket, must be reversed, without award of new trial.

Judgment in No. 21 affirmed.

Judgment in No. 22 reversed.

WAIVER OF OBJECTIONS TO PROOF OF LOSS BY REFUSING TO PAY ON SOME OTHER GROUND: See *Kansas Protective Union v. Whitt*, 59 Am. Rep. 607; *Bokes v. Amazon Ins. Co.*, 34 Id. 323; *Jones v. Mechanics' F. I. Co.*, 13 Id. 405; *Clark v. New England M. F. I. Co.*, 53 Am. Dec. 44, note 52, where other cases in that series are collected; *Ayres v. Hartford F. I. Co.*, 85 Id. 553. Or

by failure to make timely objection: *Keeney v. Home Ins. Co.*, 27 Am. Rep. 60; *Pratt v. New York C. I. Co.*, 14 Id. 304; *Franklin F. I. Co. v. Chicago Ice Co.*, 11 Id. 469. But a waiver is not established by the insurer's having received the notice without objection, giving to the insured directions about making out a statement of his loss, and examinations by the insurers' agent respecting the nature of it: *Trask v. State F. & M. I. Co.*, 72 Am. Dec. 622, note 624.

OBJECTION FOR WANT OF PROPER PARTIES: See *Proprietors of M. M. v. Yellow Jacket S. M. Co.*, 97 Am. Dec. 510.

COVER v. STEM.

[67 MARYLAND, 449.]

RELATION OF DEBTOR AND CREDITOR MUST BE CREATED AND SUBSIST IN LIFETIME of the parties to an instrument in order to make it a valid obligation for the payment of money, though the time of payment may be deferred until after the death of one of the parties.

INSTRUMENT IN FOLLOWING FORM IS TESTAMENTARY IN CHARACTER, and not an obligation for the payment of money, and no recovery thereon can be had against the executor: "Md., September 4, 1884. At my death, my estate or my executor pay to July Ann Cover the sum of three thousand dollars. David Engel, of P. [Seal] Witness: Columbus Cover,"—although it was delivered to the person to whom payment was directed to be made. And its construction cannot be affected by the fact that it must fail of effect as a testamentary paper, because of insufficient witnesses under the statute.

DEBT. The opinion states the case.

James A. C. Bond and William H. Thomas, for the appellant.

Charles B. Roberts, attorney-general, for the appellee.

By Court, ALVEY, C. J. This is an action of debt brought by the appellant against the appellee as executor of David Engel, deceased, to recover the sum of three thousand dollars, alleged to be due and owing by virtue of what is described in the declaration as a writing obligatory, made and delivered by the appellee's testator, on the fourth day of September, 1884.

The declaration contains several counts, all founded upon the supposed writing obligatory; and which writing was filed with the declaration, and by agreement is incorporated in and made part of the declaration. The appellee demurred to the entire declaration, and the court below sustained the demurrer, and gave judgment for the defendant. It is from that judgment that this appeal is taken.

The instrument declared on is in the following form: —

“Md., September 4, 1884

“At my death, my estate or my executor pay to July Ann Cover the sum of three thousand dollars.

Witness:

“DAVID ENGEL, of P. [Seal]

“COLUMBUS COVER.”

It is contended on the part of the appellant that this instrument is a bill obligatory, and imports a legal obligation of the maker, the time of payment only being deferred until after his death, when his administrator or executor was directed to pay the amount. While, on the other hand, it is contended by the appellee that the instrument has all the characteristics of a testamentary paper, and did not, in any proper sense, create a legal obligation upon the maker, such as that of a bond or single bill.

What the consideration may have been to induce the maker to pass such an instrument does not appear. But it is insisted that the seal to the instrument imports a sufficient consideration for the obligation of the maker; and this, as a general proposition, is certainly true, as applied to bonds and deeds generally. But still the question here is, whether the instrument declared on be in its nature a bill obligatory, binding and conclusive upon the maker, or whether it be a mere posthumous disposition of three thousand dollars, part of his estate, to be paid by his executor, as any other pecuniary legacy given by the testator.

An obligation is defined to be a deed in writing, whereby one man doth bind himself to another to pay a sum of money, or do some other thing: Shep. Touch., tit. Obligation, p. 367. The same definition is given in Com. Dig., tit. Obligation, B, and in Bac. Abr., tit. Obligation, B. It is true, no precise form of words is necessary to create a bond or obligation. Therefore, any memorandum in writing, under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay; for it is said that any words which prove a man to be a debtor, if they be under seal, will charge him with the payment of the money: *Core's Case*, Dyer, 226; Shep. Touch. 368-370; and Bac. Abr., tit. Obligation, B, and the examples there given of what form of words will be sufficient to create a valid obligation. It is, however, laid down in Bac. Abr., tit. Obligation, B, as essentially necessary to create a valid obligation, that words be employed to declare the intention of the party, and which must clearly denote his being bound; “because

such obligation is only in the nature of a contract, or a security for the performance of a contract, which ought to be construed according to the intention of the parties." In other words, there must be terms employed to create a *debitum in præsenti*, though the *solvendum* may be *in futuro*, and even after the death of the obligor. It would seem to be clear that the relation of debtor and creditor must be created and subsist in the lifetime of the parties to the instrument, though the time of payment may be deferred until after the death of one of the parties: Shep. Touch. 368, 369; *Hannon v. State*, 9 Gill, 440; *Carey v. Dennis*, 13 Md. 1; Story on Promissory Notes, sec. 27.

Here, in the instrument before us, there are no words that create a *debitum in præsenti*; there are no words that create the relation of debtor and creditor in the lifetime of the parties to the instrument; but the words employed simply import a posthumous disposition of a part of the estate of the maker of the instrument, and nothing more.

This case is not substantially distinguishable from the case of *Byers v. Hoppe*, 61 Md. 206; 48 Am. Rep. 89. In that case, Hoppe, the writer of the letter to Ann Byers, the party to whom the letter was addressed and delivered, said: "Ann, after my death, you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death." That was declared to be a testamentary paper; and the only real distinguishing feature between the paper in that case and the paper in this is, that the paper in the former was not under seal, and the paper in this case is. That, however, can make no substantial distinction in determining the real character of the instrument, as wills are more frequently executed under seal than otherwise. Nor can the fact that the instrument was delivered to the party to whom payment was directed to be made change the real nature of the instrument. For the principle is well settled that an instrument may be in the form of a deed, signed, sealed, and delivered as such, and still, if it be apparent that the party intended a posthumous disposition of his property, the instrument not being operative until after his death, such instrument will be regarded as testamentary.

A will is defined to be any instrument whereby a person makes a disposition of his property to take effect after his death. By the terms of the instrument in question, the three thousand dollars are simply directed to be paid out of his

estate by his executor. No language could be more expressive of a testamentary purpose. And this court has declared, in *Carey v. Dennis*, 13 Md. 17, adopting the language of Mr. Justice Buller, in *Habergham v. Vincent*, 2 Ves. Jr. 231, that "the cases have established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will."

It is urged, however, in argument, that as the instrument in question was made since the act of 1884, chapter 293, requiring at least two witnesses to bequests of personal estate, it is ineffectual as a testamentary paper, because it has but one witness, and therefore it should, if possible, be construed to have effect as a bond or obligation. But whether the instrument shall be declared a valid obligation, or to have a testamentary character only, must be determined from the terms and provisions of the instrument itself: *Carey v. Dennis, supra*. We have shown that the instrument has not the essential terms to create a *debitum*, personally binding the deceased in his lifetime; and this construction cannot be affected by the fact that the instrument, being testamentary in its character, must fail of effect, because of insufficient witnesses under the statute.

It follows that the judgment of the court below must be affirmed.

Judgment affirmed.

WHETHER INSTRUMENT IS CONTRACT OR WILL, WHAT DETERMINES: See *Oaviness v. Rushton*, 15 Am. Rep. 759; *Towle v. Wood*, 49 Id. 326; *Schumaker v. Schmidt*, 4 Id. 135; *Burlington University v. Barrett*, 92 Am. Dec. 376, note 383, where other cases in that series are collected.

CLEMENTS v. ODORLESS EXCAVATING APPARATUS Co.

[67 MARYLAND, 461.]

PLAINTIFF CANNOT RECOVER IN ACTION FOR MALICIOUS PROSECUTION OF CIVIL SUIT, unless he produces evidence to prove that the suit was instituted not only maliciously but without probable cause.

JUDGMENT OF CIRCUIT COURT OF UNITED STATES, ON PROOFS TAKEN, and after argument by counsel, awarding the complainant an injunction to restrain an alleged infringement of a patent right, ought to be considered conclusive as to the question of probable cause, although the judgment was reversed on appeal to the supreme court.

ACTION for damages. The opinion states the case.

John F. Preston, for the appellant.

J. Alexander Preston, for the appellee.

By Court, ROBINSON, J. A bill was filed by the appellee in the United States circuit court for the district of Maryland against the appellant, for the infringement of reissued letters patent granted to Lewis R. Keizer for an apparatus used in cleaning and emptying privies, the original patent having been granted to Henry C. Bull. The appellant, in his answer, denied that Bull was the inventor of the apparatus described in the original patent, and charged that the reissued letters patent granted to Keizer were not for the same invention described in the original patent, but for other and different inventions, not known to Bull at the time the original patent was granted; and further, that the said reissued letters patent were fraudulently obtained, and that the specifications and claims were fraudulently enlarged for the purpose of including other and subsequent inventions. The appellant also claimed that the apparatus or machine used by him was constructed in accordance with letters patent granted to Samuel R. Scharf and Jerome Bradley.

The case was heard on bill, answer, and proof, and the circuit court (judges Bond and Morris) being of opinion that the machine used by the appellant was an infringement of the reissued letters patent granted to Keizer, enjoined the appellant from making, using, or vending said machine containing the inventions and improvements described in said reissued letters patent. On appeal to the supreme court of the United States, the decree below was reversed, on the ground that the improvement claimed in the reissued letters patent granted to Keizer was but an expansion of the Scharf and Bradley improvements.

This action is brought by the appellant to recover damages of the appellee for having instituted suit in the United States circuit court maliciously and without probable cause. Whatever may be said of the earlier decisions, it is quite well settled that an action will lie in some cases for the malicious prosecution of a civil suit without probable or reasonable cause, although there is some conflict as to the cases embraced within the rule. Such suits are not, however, encouraged, because the law recognizes the right of every one to sue for that which he honestly believes to be his own, and the *payment of costs incident to the failure to maintain the suit*

is ordinarily considered a sufficient penalty. In *McNamee v. Minke*, 49 Md. 122, we had occasion to consider the law in regard to such actions, and the court said: "When it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of *Turner v. Walker*, 3 Gill & J. 377, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like." Now, if it be conceded that a bill in equity by the appellee, to restrain the appellant from using an apparatus or machine, on the ground that it was an infringement of letters patent issued to the plaintiff, comes within the rule thus laid down, without, however, so deciding, it is sufficient to say there was no evidence in this case to sustain the action. To entitle the appellant to recover, he was bound to offer evidence from which a jury could reasonably find that the bill for an injunction was instituted by the appellee, not only maliciously, but without probable cause.

Now, what was the evidence relied on to support the action? In the first place, the appellant offered the record of the appeal from the decree of the circuit court, and the decree of the supreme court reversing the same. By this record, it appears that the injunction proceeding was heard by the circuit court on proof taken by both sides, and after argument by counsel of the respective parties, that court was of opinion that the apparatus used by the appellant was an infringement of the patent rights of the appellee. It was the deliberate judgment of a court of competent jurisdiction that there was not only a probable cause for filing the bill for injunction, but that the appellee was entitled to the relief prayed. A judgment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the supreme court; otherwise in every case of reversal an action would lie for the institution of the original suit.

The appellant then offered in evidence the record in a suit brought by the appellee against Thomas Quillan for using an apparatus bought by him of the appellant, and in which suit the circuit court was of opinion that the apparatus thus used was an infringement of the patent rights of the appellee, and then proposed to show that the decree in that case was the result of fraud and collusion between the appellee and Quillan. So in a suit by the appellant against the appellee, for the ma-

licious institution of a civil proceeding, the jury was to determine the merits of a controversy between the appellee and another party. We do not see on what grounds the Quillan case could be offered in evidence in this suit, because it was between other parties; and besides, whether brought by the appellee in good faith or bad faith, it did not tend to show that the bill filed against the appellant was without probable cause. And in addition to all this, the appellant in his answer to the injunction suit made substantially the same averment in regard to the Quillan case, and what was considered and passed upon by the circuit court.

Finding no error in the several rulings below, the judgment will be affirmed.

Judgment affirmed.

BOTH MALICE AND WANT OF PROBABLE CAUSE MUST BE PROVED TO SUSTAIN ACTION FOR MALICIOUS PROSECUTION OF CIVIL SUIT: See *Dickinson v. Maynard*, 96 Am. Dec. 379, note 381; *Morton v. Young*, 92 Id. 565, note 568; *Alexander v. Harrison*, 90 Id. 431, note 438, where other cases in that series are collected.

ACTION FOR MALICIOUS PROSECUTION OF CIVIL SUIT WILL LIE, ALTHOUGH THERE WAS NO SEIZURE OF PERSON OR PROPERTY: See *Eastin v. Bank of Stockton*, 56 Am. Rep. 77; *McCardle v. McGinley*, 44 Id. 343, note 346. *Contra*: *Wetmore v. Mellinger*, 52 Id. 465. And in such case the plaintiff is entitled to recover the damages sustained by him: *Lawrence v. Hagerman*, 8 Id. 674; *Closson v. Staples*, 1 Id. 316.

PROBABLE CAUSE, WHAT IS, AND EVIDENCE OF: See *Ross v. Innis*, 85 Am. Dec. 373, note 381, where other cases in that series are collected; *Johnson v. Miller*, 50 Am. Rep. 758; *Bitting v. Ten Eyck*, 42 Id. 505; *Shaul v. Brown*, 4 Id. 151.

EUTAW PLACE BAPTIST CHURCH OF BALTIMORE CITY v. SHIVELY.

[67 MARYLAND, 498.]

REQUEST TO CHURCH, "INTEREST, INCOME, OR PROCEEDS THEREOF TO BE APPLIED TO THE SUNDAY SCHOOL belonging to or attached to said church," is sufficiently definite and certain in respect to the objects thereof, and capable of being enforced, where the Sunday school is shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church, although such Sunday school is not itself a corporate body.

APPEAL. The opinion states the case.

James Pollard, for the appellant.

Samuel D. Schmucker, for the appellees.

By Court, ALVEY, C. J. George Gelbach, Jr., died in 1880, and by his will, duly admitted to probate, among other bequests, he bequeathed as follows:—

“I give and bequeath to the Eutaw Place Baptist Church of Baltimore City, the sum of one thousand dollars, the income, interest, or proceeds thereof to be applied to the Sunday school belonging to or attached to said church; and I declare that the receipts of the treasurer of said church or corporation shall be a sufficient discharge to my executors for said legacy.”

The testator was a member of the church, and had, by his attention and contributions, manifested great interest in the Sunday school, organized, fostered, and maintained by the church as a means of religious education for the young.

The corporate title of the church is, “The Trustees of the Eutaw Place Baptist Church of Baltimore City”; but there is no question raised as to the want of accuracy in the designation of the corporate body in the bequest. The identity of the legatee is unquestioned. The legislature of the state, by act of 1882, chapter 87, gave its sanction to the bequest, as required by the constitution.

If the bequest had simply been to the church, without reference to the Sunday school, there could have been no question of its validity, and the church could have applied the fund to any purpose, and to promote any object, within the sphere of its corporate powers and functions as a religious body. But it is contended that the Sunday school is an unincorporated body, independent of the church, and therefore without legal entity; and that the bequest to the church is in trust for this undefined and uncertain body of individuals that fluctuates from time to time without legal succession, and consequently the bequest is void because of this uncertainty and want of legal identification of the objects to be benefited by the bequest. In this contention, however, we do not concur.

It is certainly true, as contended by the appellees, that, according to the law as settled in this state, a bequest to trustees for the benefit of a vague and indefinite object is equally as invalid as an immediate bequest to such object; as in neither case could the right to the enjoyment of the fund be established and enforced by any particular individual or individuals claiming to be within the contemplation of the bounty. But is this bequest one of that description? We think not.

The Sunday school, as such, is not an incorporated body,

it is true; but it is shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church. The church is not organized simply to maintain a pulpit that its members and others may receive instruction from that source alone. Other means of religious instruction are as common, and are as much within the province of church regulation and direction, as the pulpit itself. Prominent among these are the Bible class and the Sunday school. Not that Bible classes and Sunday schools may not be formed and maintained independently of any church control; but we all know that they are ordinary means adopted in church organizations for the promotion of religious instruction. And that being so, why may not the incorporated church receive aid from the benevolent dispenser of charities for the support of a Sunday school or a Bible class, as well as for the support of the minister who teaches from the pulpit? Neither Bible class nor Sunday school can be successfully maintained without pecuniary outlay. Books, fuel, and lights are among the necessary things to be supplied; and if the necessary expenses be not otherwise provided, they must be raised by contributions from the congregation. It is shown that this particular Sunday school has been maintained at considerable annual expense to the church.

Mr. Hiram Woods, an active member of the congregation, was examined as a witness. He says that the Sunday school was organized simultaneously with the formation of the church; that it is an integral part of the church organization; that it is an organization in the church and part of it; and that it has no organization separate from the church. He says, moreover, that the work of the Sunday school is considered the most important branch of the church work; that it comprehends the religious instruction of both children and adults. Mr. Joshua Levering, a member of the church, one of its trustees, and superintendent of the Sunday school, states substantially the same facts. It is thus shown that the relation of this Sunday school to the church is that of entire dependence upon the church organization and its supervision for support and control.

This court has held, in the case of *England v. Vestry of P. G. Parish*, 53 Md. 467, that a bequest of a sum of money to the vestry of a particular church, to be invested, and the annual interest thereof to be devoted to the support of the rector or minister for the time being, was valid. And in the recent

case of *Crisp v. Crisp*, 65 Id. 422, where the testator gave a sum of money to be expended in the erection of a branch church, such branch church when erected to be conveyed to a certain designated church organization, as the parent church, previously incorporated and in being, and of which the testator was a member, it was held by this court that such bequest was valid and effectual. And as the bequests in those cases were regarded as sufficiently definite and certain, and capable of being enforced, we can perceive no reason why the bequest in this case is not equally so.

Nor is there anything in the case of *Church Extension etc. v. Smith*, 56 Md. 362, at all in conflict with the view taken of the bequest in this case. In that case, the bequests that were declared void for the want of certainty and definiteness in the objects to be benefited were quite different in their nature and characteristics from the bequest involved in this case. There, one of the bequests was to "the trustees of the Strawbridge Methodist Episcopal Church, for the benefit of the Ladies' Mite Society of said church, situate," etc. The Ladies' Mite Society was a voluntary, unincorporated association, and the bequest to its use was held to be invalid, because of the difficulty and uncertainty in determining for whose benefit the gift was intended. And so, in the same case, in regard to the sum bequeathed to the "Church Extension of the Methodist Episcopal Church, incorporated by the state of Pennsylvania, to be used as part of the 'Perpetual Loan Fund' of said society, and to bear the name of the 'Durham Loan Fund.'" The objects to be benefited by the fund thus created were, according to the agreed statement of facts, "the necessitous churches of the Methodist Episcopal Church, erected from time to time within the limits of the United States and its territories," etc., as the committee in charge of the fund might, in their discretion, select. That bequest was held void for want of certainty in respect to the objects of the charity, and those who could have standing in court to insist upon the execution of the trust. Such, manifestly, is not the case here.

That portion of the decree of the 28th of March, 1887, that declares the bequest to the Eutaw Place Baptist Church of Baltimore City void, will be reversed, with costs, and the cause be remanded.

Decree reversed and cause remanded.

DEVISES AND BEQUESTS TO CHARITABLE USES, WHEN VALID, AND WHEN VOID FOR UNCERTAINTY: See *Howe v. Wilson*, 60 Am. Rep. 228, note 220.

where this subject is discussed at some length; *Webster v. Morris*, 57 Id. 278; *Maught v. Getzendanner*, 57 Id. 352; *Fontaine v. Thompson*, 56 Id. 588; *Kent v. Dunham*, 56 Id. 667; *Beardsley v. Selectmen of Bridgeport*, 55 Id. 152; *Mills v. Newberry*, 54 Id. 213; *Hinckley v. Thatcher*, 52 Id. 719; *Coit v. Comstock*, 50 Id. 29; *Barnum v. Mayor etc. of Baltimore*, 50 Id. 219; *Quinn v. Shields*, 49 Id. 141; *Goodale v. Mooney*, 49 Id. 334; *Sowers v. Cyrenius*, 48 Id. 418; *Prichard v. Thompson*, 47 Id. 9; *O'Hara v. Dudley*, 47 Id. 53; *Fairfield v. Lawson*, 47 Id. 669; *Magee v. O'Neill*, 45 Id. 765; *Nichols v. Allen*, 39 Id. 445, note 453; *Simpson v. Welcome*, 39 Id. 349; *Power v. Cassidy*, 35 Id. 550; *Ould v. Washington Hospital for Foundlings*, 29 Id. 605; *Clement v. Hyde*, 28 Id. 522; *American Tract Society v. Atwater*, 27 Id. 422; *Adye v. Smith*, 26 Id. 424; *Grimes v. Harmon*, 9 Id. 690; *Zeisweiss v. James*, 3 Id. 558; *City of Philadelphia v. Girard's Heirs*, 84 Am. Dec. 470, note 478; *Beekman v. Bonsor*, 80 Id. 269, note 286; *Owens v. Missionary Society of M. E. Church*, 67 Id. 160, note 184; *Urney v. Wooden*, 59 Id. 615, note 619, collecting other cases in that series; *Bridges v. Pleasants*, 44 Id. 94, note 98 et seq., where this question is discussed at length.

PARLETT v. GUGGENHEIMER.

[67 MARYLAND, 542.]

PARTY WHO HAS SIMULATED ANOTHER'S TRADE-MARK IS IN NO CONDITION TO COMPLAIN of a third party for simulating the trade-mark that he himself is using in fraud of the original owner's rights.

RIGHT OF PARTY TO HAVE HIS TRADE-MARK PROTECTED IS FORFEITED by his stamping upon his goods, in connection with such trade-mark, representations which are untrue, intended to mislead the public into a belief that his goods have an origin other than the true one. And where such forfeiture has once been declared by a court having jurisdiction of the subject-matter and of the parties, the production of that record will be sufficient for the same purpose in every other court. While he may thereafter continue to use such trade-mark, his right of exclusive use is gone from him forever, and the right to the exclusive use which he himself cannot assert, no other person can assert for him.

WHERE FIRST PERSON TO USE WORDS "GOLDEN CROWN" AS TRADE-MARK HAS FORFEITED HIS RIGHT to the exclusive use thereof, another person may use those words, in connection with other devices, to constitute a trade-mark of his own, and is entitled to an injunction to restrain a third person from infringing such trade-mark by using an imitation of it so close as to mislead the ordinary purchaser, there being convincing proof that the similarity is the result of design, and not of accident.

BILL of complaint filed by the appellants against the appellees, praying that an injunction might issue to restrain the defendants, their agents, servants, and attorneys from manufacturing or selling or offering for sale plugs of tobacco of the kind described in the bill, having affixed thereto the designatory marks or tags entitled the "Golden Chain," or any other tags or marks so nearly resembling those of the plaintiffs filed

with the bill as to deceive persons purchasing said articles, until the matter could be heard and determined in equity. The bill also prayed that the defendants make true and full disclosures of the sales made by them, and of the goods manufactured by them in imitation of the plaintiffs' goods, and that they might be decreed to account therefor in full. General relief was also prayed for. An injunction was issued upon the bill. The defendants answered, issue was joined, and testimony taken, whereupon the court dissolved the injunction, and dismissed the bill. The complainants appealed.

E. J. D. Cross and John K. Cowen, for the appellants.

William H. Browne and William P. Whyte, for the appellees.

By Court, STONE, J. The learned judge of the circuit court of Baltimore City, in the opening of his very lucid opinion in this case, says: "From an inspection of the exhibits filed in this case, and an examination of the testimony, I have no doubt that the trade-mark adopted by the defendants is a simulation of that of the plaintiffs, calculated to deceive the ordinary retail purchaser; and I think the testimony further shows that the simulation was designed for the purpose of enabling the defendants to put their goods upon the market upon the reputation previously acquired by the goods of the plaintiffs."

To the views so far expressed by him we fully assent; but he goes on to say that while that is so, the plaintiffs are not entitled to the relief they ask, because, according to the evidence, one Lorin Palmer, of Chicago, long before the plaintiffs used the trade-mark, had adopted and used it, and therefore they could not have an injunction against others when they themselves were liable to one at the suit of Palmer. From these latter views we are compelled to dissent.

One defense set up by the defendants is in fact a *quasi* admission that they were simulating the trade-mark of the plaintiffs, but that the plaintiffs were simulating the trade-mark of Palmer, and therefore could not complain of them. It is a plea of confession and avoidance, but it still would be a good plea if sustained by the proof; for if the evidence does show that the plaintiffs were committing, by the use of their trade-mark, a fraud on Palmer, they are in no condition to complain of the defendants' fraud on them.

The appellants, plaintiffs below, are manufacturers of plug

twist chewing-tobacco, and their trade-mark consists of the words "Golden Crown" marked on the boxes in which the tobacco is packed, and in addition, four tin tags of a particular size, shape, lettering, and position on each bar of the tobacco, and on each tag, also, the words "Golden Crown." These tin tags form a very important part of the plaintiffs' trade-mark. The tin tag device was adopted to prevent frauds on the retail purchaser, who could then be sure that he obtained what he wanted, and of which he could not be sure, as long as the trade-mark was only on the top of the boxes in which the tobacco was packed.

The trade-mark of Palmer, which the plaintiffs are charged with using, are the words "Golden Crown." He used no tin tags, or anything, on the bars of tobacco, but only used his trade-mark on the packages of manufactured tobacco and on the boxes of cigars.

It is also shown that Palmer had used this trade-mark from 1858, long before the adoption by the plaintiffs of their trade-mark, and it is further shown that the plaintiffs were in entire ignorance of its use by Palmer up to the bringing of this suit.

It also appears from the agreement in this case that this Lorin Palmer brought suit about 1869 against one Harris of Philadelphia, claiming that Harris was simulating his trade-mark, and seeking a court of equity to restrain him. Harris, in his answer, admitted the imitation, but based his defense upon the fact that Palmer had no standing in a court of equity to get the relief he asked, because he, Palmer, had marked on his cigar-boxes that the cigars were made in Havana, when in fact they were not made there, but made in New York, and this Palmer admitted, and the supreme court of Pennsylvania decided that Palmer was not entitled to relief.

The court said in substance, in that case, that the ground for relief for simulating trade-marks was the promotion of honesty and fair dealing, and that equity would not extend its protection to one whose case is not founded on truth.

It appears also from the agreed statement of facts that Harris has continued since that trial to manufacture the labels, and has not been disturbed by Palmer.

Trade-marks are protected by courts of equity for two reasons. One is to secure to the honest, skillful, and industrious manufacturer the legitimate fruits of his skill and industry, and the other to protect the public against the frauds of unprincipled vendors, who seek to pass off spurious wares as those of estab-

lished reputation under the name of the genuine commodity: Upton on Trade-marks, pp. 28, 29. The same author goes on to say that such protection is only afforded the honest manufacturer, and that where a person seeks by representations which are untrue (whether forming a part of his trade-mark or not) to mislead the public into a belief that his commodities have an origin other than the true one, he is entitled to no relief against any one who may see fit to appropriate it: *Flavell v. Harrison*, 19 Eng. L. & Eq. 15; *Fetridge v. Wells*, 4 Abb. Pr. 144. In this last case the judge in his opinion says: "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If the sales made by the plaintiffs are effected, or sought to be by misrepresentation and falsenood, he cannot be listened to when he complains that, by the fraudulent rivalry of others, his own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to sanction. To do so would be to forfeit its name and character."

From these and many similar cases which might be cited, the conclusion is irresistible that he who seeks to mislead the public and to palm off on it the spurious for the genuine article under the guise of his trade-mark, or coupled with it, forfeits for all time, not his right to use his trade-mark, for with that the courts will not interfere, but his right to have that trade-mark protected. The record of his conviction of the fraud is the conclusive proof of it. Courts will not try over and over a question that has been settled by a court of competent jurisdiction over both the person and subject-matter. When, therefore, the supreme court of Pennsylvania, in a suit begun by himself, decided that Palmer had forfeited his right to be protected in the use of the trade-mark "Golden Crown," the production of that record will be sufficient for the same purpose in every other court. He invited the issue, he was duly heard upon it, and if it is found against him he must abide the consequence.

Lorin Palmer is not himself concluded by the decision in this case, as he is no party to this suit, and we would very cheerfully have avoided all reference to him or his case. But the defendants have thrust him forward as a witness upon whom they relied, to prove that he had the exclusive right to the trade-mark "Golden Crown," and the plaintiffs produced the record to show that he had now no such exclusive right. That record we are bound to consider and give to it its legal effect.

From what we have said, it is apparent that in our opinion Lorin Palmer by his false representations, of which he stands duly convicted, has placed himself outside the pale of the protection of a court of equity, in any exclusive use of this trade-mark. He can of course go on and use it as long as he pleases, but the right of exclusive use is gone from him forever. If Palmer himself could not be successfully heard in a court of equity asserting his right to the exclusive use of this trade-mark, certainly the defendants cannot successfully assert his right for him. They cannot do for him what he cannot do for himself, and their plea in that behalf is unavailing.

We have been discussing heretofore only the question of the right of the plaintiffs to the use of the words "Golden Crown" as a trade-mark, or part of a trade-mark, and shown that they have that right.

But the defendants have not used the words "Golden Crown" at all. "Golden Chain" is what they have adopted as part of their trade-mark, and if the only question in the case was whether the words "Golden Chain" was an infringement of the trade-mark of "Golden Crown," we should unhesitatingly say it was not.

But the words "Golden Crown" and "Golden Chain" only constitute a part of the respective trade-marks of the plaintiffs and the defendants. The tin tags, marked, lettered, and arranged as we have said, constitute the most material part of the trade-mark of the plaintiffs.

The infringement complained of here is that the tobacco of the defendants in every essential particular is gotten up in imitation of the plaintiffs, and that the imitation is so close as to mislead the ordinary purchaser. The exhibits will convince every impartial observer that such is the fact, and the evidence will convince any impartial judge that this similarity is the result of design, and not of accident.

The law applicable to cases like this is fully stated in the case of *McLean v. Fleming*, 96 U. S. 245; and an extract from the opinion in that case will cover this.

"Much depends," says the court, "in every case upon the appearance and special characteristics of the entire device; but it is safe to declare as a general rule that exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection. If the form, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be

likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable relief."

Many cases might be cited extending and amplifying this doctrine, but we will content ourselves with but one more extract, and that from the English case of *Or, Ewing, & Co. v. Johnson & Co.*, L. R. 7 App. C. 219, where the judge, in delivering the opinion of the house of lords, said: "No man, however honest his intentions, has a right to adopt and use so much of his rival's trade-mark as will enable any dishonest dealer into whose hands his goods may come to sell them as the goods of his rival."

When we consider that the article chewing-tobacco is bought and used most extensively by a large class of the illiterate and ignorant, we think no stronger case of infringement by simulation than this can be found in the books.

The decree of the court below must be reversed, and the case remanded, that an injunction may issue as prayed, and account be taken, if desired, as is usual in such cases.

Decree reversed and case remanded.

TRADE-MARK — RIGHT TO USE OF WHEN PROTECTED: See *Pierce v. Guitard*, 58 Am. Rep. 1; *Ball v. Siegel*, 56 Id. 766; *Armstrong v. Kleinhaus*, 56 Id. 894; *Rogers v. Rogers*, 55 Id. 78; *Myers v. Kalamazoo Buggy Co.*, 52 Id. 811; *Alexander v. Morse*, 51 Id. 369; *Eggers v. Hink*, 49 Id. 96; *Desmond's Appeal*, 49 Id. 118; *Williams v. Brooks*, 47 Id. 642, note 648; *Selchow v. Baker*, 45 Id. 169; *Royal Baking Powder Co. v. Sherrell*, 45 Id. 229; *Larrabee v. Lewis*, 44 Id. 735; *Morgan's Sons & Co. v. Trowell*, 42 Id. 294; *Insurance Oil Tank Co. v. Scott*, 39 Id. 286, note 290; *Olin v. Bate*, 38 Id. 78; *Marshall v. Pinkham*, 38 Id. 756; *Shaver v. Shaver*, 37 Id. 194; *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 37 Id. 362; *Hier v. Abrahams*, 37 Id. 589; *Lichtenstein v. Mellis*, 34 Id. 592, note 593; *Robertson v. Berry*, 33 Id. 328; *Dunbar v. Glenn*, 24 Id. 395; *Popham v. Cole*, 23 Id. 22, note 27; *Carmichel v. Latimer*, 23 Id. 481; *Meneely v. Meneely*, 20 Id. 489; *Glen and Hall Mfg. Co. v. Hall*, 19 Id. 278; *Caswell v. Davis*, 17 Id. 233; *Taylor v. Gillies*, 17 Id. 333; *Glendon Iron Co. v. Uhler*, 15 Id. 599; *Wolfe v. Barnett*, 13 Id. 111; *Burke v. Cassin*, 13 Id. 204; *Meriden Britannia Co. v. Parker*, 12 Id. 401; *Newman v. Alford*, 10 Id. 588; *Holmes v. Holmes B. & A. Mfg. Co.*, 9 Id. 324; *Gillott v. Esterbrook*, 8 Id. 553; *Congress & E. S. Co. v. High R. C. S. Co.*, 6 Id. 82; *Candle v. Deere*, 5 Id. 125; *Choynski v. Cohen*, 2 Id. 476; *Falkenburg v. Lucy*, 95 Am. Dec. 76; *Boardman v. Meriden Britannia Co.*, 95 Id. 270, note 277, where other cases in that series are collected.

MISREPRESENTATIONS, INTENDED TO DECEIVE, DEFEAT RIGHT OF OWNER OF TRADE-MARK TO PROTECTION: See *Siebert v. Abbott*, 48 Am. Rep. 101; *Funke v. Dreyfus*, 44 Id. 413; *Connell v. Reed*, 35 Id. 397; *Hennessy v. Wheeler*, 25 Id. 188, note 191, where this subject is discussed at length; *Laird v. Wilder*, 15 Id. 707; *Palmer v. Harris*, 100 Am. Dec. 557.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

LOWELL v. STRAHAN.

[145 MASSACHUSETTS, 1.]

LEASE OF "FIRST FLOOR IN BUILDING" INCLUDES OUTSIDE OF FRONT WALL of that part of the building, with the right to use and enjoy the same as leased premises, in the absense of anything to the contrary in the lease.

LESSEE'S AGREEMENT TO ALLOW THIRD PERSON TO PLACE SIGN UPON OUTSIDE WALL OF LEASED BUILDING, for a certain time, in consideration of an annual payment, creates a license merely, and is therefore not a breach of a covenant not to underlet any part of the premises.

ACTIONS by John Lowell and others, and by Augustus Lowell, against Thomas Strahan. The first action was for money had and received, brought by the plaintiffs, as owners of a building, against the defendant as lessee of a part thereof, to recover a sum of money which the lessee had received from a third person, whom he had allowed to place a sign upon the outer wall of the building; and the second action was for the breach of a covenant not to underlet, brought by the lessor, who was one of the plaintiffs in the first action against the lessee. It was agreed that the plaintiffs in the first case were the owners of the building, and that the second case should be treated as though the lease had been executed by all the plaintiffs in the first one. The lease was of "the first floor and front part of basement in building situate on the northeasterly corner of Washington and Franklin streets, in Boston," for the term of four years and eleven months from February 1, 1882. It contained covenants by the lessee to "keep

all and singular the said premises" in repair; to save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering upon the premises so leased"; and not to "assign this lease, nor underlet the whole or any part of the said premises." The lessor reserved the right "at seasonable times to enter into and upon" the premises, to examine the condition thereof. When the defendant took possession under his lease, there was a sign upon the outside of the front wall of the building, between the floor and ceiling of the first floor, which had been placed there by a firm of third persons, with the consent of the former tenant of the building. The defendant agreed with the firm to allow the sign to remain upon the wall until February 1, 1886, in consideration of an annual payment of \$150. The defendant also placed two signs of his own upon the same wall, and agreed with certain other persons that they might paint an inscription over one of these, in consideration of \$12.50 per month. The plaintiffs requested the court to rule that the lease, covering only certain rooms in the building, gave the lessee no rights in the outside of the walls, except the right to place upon them such a sign as was customary and reasonable for his own business; that the placing of other signs upon the outside of the walls was a trespass upon the property of the plaintiffs; that the defendant, having leased the right to place signs upon the walls, and received rent therefor, was liable to the plaintiffs for the sums so received; and that the agreements between the defendant and the persons who placed signs upon the walls were leases, and if the lease of the defendant covered the outside walls, they were violations of his covenant not to underlet. These rulings were refused, and the court ruled instead that the outside of the walls in question was included in the lease, and that the agreements of the defendant with the persons whom he allowed to place or retain signs upon the walls did not amount to an underletting. The court ordered judgment for the defendant in both actions, and reported the cases for the determination of this court.

A. L. and F. C. Lowell, for the plaintiffs.

A. Hemenway and D. F. Kimball, for the defendant.

By Court, W. ALLEN, J. We think that the outside of the front wall was part of the premises demised in the lease of

the first floor in the building. If the language had been used in a conveyance in fee-simple, no question could have been made that the walls of the building were included. Undoubtedly, the owner of a building might, in conveying the lower and upper portions of it to different grantees, except the outside of the walls, as he might do in conveying the whole building to one grantee. In every case it is a question of intention, found in the language used, as applied to the subject-matter, and construed in connection with the whole instrument. A lease for years by indenture differs from a deed in fee-simple, not only in the nature of the estate created, but also in the fact that the instrument of demise is an agreement between the parties containing mutual covenants affecting their rights in the premises. The words of description used should be construed in view of these considerations, which might require a different meaning to be given to them from what would be given to similar words in a conveyance in fee.

The words "first floor" in the building are equivalent to "first story" of the building, and naturally include the walls. The apparent intention is to separate a section of the building as a distinct tenement. The words "first floor" define the lower and upper boundaries of this, but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ somewhat from the word "room." "Floor" means a section of the building between horizontal planes. The words "in building" show that the section is of the whole building, and not of a part of it. The word "room" includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside of lateral walls, at least when they constitute the walls of another room, as clearly as the words "first floor" exclude the flooring of the story above it. Under what circumstances a lease of a story of a building would include a space beyond the building over land belonging to it, need not be considered. In this case the building adjoins the sidewalk, and the words "first floor in building" must be held to include the entire front wall of that part of the building, unless there is something to control the natural meaning of the language.

That the outside of the front wall would be valuable to the lessee as part of the premises, and that the lease gives him the right to use it for some purposes, such as putting out *signs* and displaying goods, is not disputed; but it is con-

tended that the right is a privilege or easement appurtenant to the leased premises in a part of the building, not parcel of them. The defendant contends, on the other hand, that the outside of the front wall is parcel of the leased premises. It often occurs in leases of part of a building that rights in other parts, or in land not parcel of the premises, as in entries, passage-ways, and yards, pass as appurtenant to them. The question in such cases generally is, not what is parcel of the demised premises, but what is incident to them. In general, a deed or lease of a house or store will include the land under it.

In *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220, and in *Shawmut Nat. Bank v. Boston*, 118 Mass. 125, it was held that the land under a building would not pass as parcel of the premises in a lease of the basement of a building, the upper stories of which were let to other tenants. In the first case, Mr. Justice Dewey said: "The proper construction of such a lease as the present, as it seems to us, is, that the lessee's right of occupation of the land is an interest, for the time being, defeasible by the destruction of the building by fire": 11 Met. 456. In the latter case, Mr. Justice Morton said: "The real question is, whether the intention of the parties, to be collected from the whole lease, was to grant to the lessees any estate in the land itself. As we have seen, the lease does not in terms grant any estate in the land. . . . In cases where different rooms in the same building are leased to separate tenants, the situation of the property and the nature of the tenures exclude the idea that each tenant takes an estate for years in the land. Such estates existing at the same time in different tenants are inconsistent and impossible. . . . The bank and Lawrence cannot both take an estate for years of the same land": 118 Mass. 129, 130.

In the case at bar, the words of description naturally include the premises in question, the outer walls. It is plain that the lease grants not merely an interest in the walls, like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy, as leased premises, for the purposes of business. That right is exclusive. The landlord has no right to use or to let it for such purposes. From the mere demise, without regard to special provisions of the lease, there is no reason that the landlord should be regarded as having rights in the outside different from what he has in the inside of the wall. As owner

of the upper tenement, he has a right in the whole wall for support, but that right would not operate to except the walls by implication from a deed in fee of the lower tenement, or from a grant of it for years. The occasions that the reversioner would have to enter upon the wall of the demised tenement must be few and extraordinary, and it could not be inferred, from the fact that the right was not expressly reserved in the lease, that the wall was excepted from it. We can see nothing in the nature of the estate granted, therefore, that should prevent the outer wall from being included as parcel of the demised premises. On the contrary, the fact that it is of value to the tenant for the use for which the premises may be occupied, and of no value for use to the landlord, would indicate that it was part of the premises, if the description was doubtful. If it did not pass by the lease in this case, it would seem that the right which the plaintiff claims could be maintained. The only right of the tenant would be to make such use of it as would be incident to his grant of the adjoining premises, and the right of the landlord would be to enter upon it, and make any use of it not inconsistent with the incidental rights of the tenant to use it. He might not have a right to take down a tenant's sign, but he would have the possession of the wall, and the right to enter upon it, and to use any of it not actually used by the tenant for any purpose not inconsistent with the use by the tenant of the leased premises. It is not reasonable to suppose that this was the intention of either party. The actual possession and use of the wall by the tenant which the parties obviously intended are substantially that of leased premises, and it would be very difficult to define or fix the respective rights of the parties in it, except on the assumption that it is a part of the demised premises.

There is nothing in the particular provisions of the lease that bears with much force upon the question. The covenant of the lessee to repair is what would be expected, whether the outside of the wall were included or not, unless the suggestion is entitled to some weight, that if the outer surface of the wall was not included, the lessor would probably have insisted upon a special covenant by the lessee to keep it in repair. Perhaps the covenant by the lessee to save the lessor harmless from all damages arising from neglect in not removing snow and ice from the roof of the building, or "from the sidewalks bordering on the premises so leased," may afford a slight inference that the wall, including the outer surface of it, was part of the

premises. The covenants by the lessee not to underlet, and not to make any unlawful, improper, or offensive use of the premises, nor any alterations or additions, and that the lessor may enter upon the premises to examine the condition thereof, while proper to protect the interest of the reversioner in the surface of the wall, do not appear to have particular reference to that. We can find nothing in the lease which militates against the idea that the whole outer wall is included in the premises; and the description of the premises as applied to the subject-matter, and the right in the outer surface of the wall, which it is reasonable to suppose the parties intended that the lessee should have, and the entire reasonableness that the whole of the front wall of that part of the building should be included in the lease of a floor or story of it, in connection with the particular provisions of the lease, lead us to the conclusion that the outer surface of the wall was part of the demised premises.

We find no authority against the conclusion we have reached. *Pevey v. Skinner*, 116 Mass. 129, decided that, where different rooms in a building were let to different tenants, a license by the owner of the building to the tenant of a lower room to place his sign on the outer wall of the building, extending fifteen inches higher than the floor of the room above, was not revoked by a lease of the room above, which contained the provision that "the lessee may have the right to place signs upon the outer wall of said rooms." The general right in the outer wall of the lessee of a single room was not considered. The court said: "His right to use the outer surface of the wall was defined, and thereby limited by the terms of the lease." The decision can have very little bearing upon the lease of a "floor," which does not define and limit the right to use the outer wall.

Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388, and *Baldwin v. Morgan*, 43 Hun, 355, are directly in favor of our conclusion.

Loring v. Bacon, 4 Mass. 575, and *Cheeseborough v. Green*, 10 Conn. 318, 26 Am. Dec. 396, are cases where the respective rights of owners of lower and upper tenements in the same building are considered, but have no particular bearing upon the case at bar.

It is contended that the agreement of the defendant to allow the sign of a stranger, in consideration of an annual payment by him, to remain upon the outside wall demised, was a breach

of the covenant in the lease not to underlet any part of the premises. But this was a license, and not a lease. It was permission to do a particular act, namely, to affix a sign to the wall, and gave no authority to do any other act upon the premises. The fact that the permission was paid for, and that the act permitted was a continuing one, are ordinary elements of a license. Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further. A lease gives the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms. It is clear in this case that the intention was that the licensee should have no other right in the premises than to affix his sign to them, and that every other right should remain in the defendant. An agreement of this nature cannot be construed as a lease; it must create either a license or an easement.

In *Pevey v. Skinner*, *supra*, it was said that permitting a sign to be kept upon the wall for a long time would imply a license, but it was not intimated that it would imply a lease of the outer surface. We have not been referred to any case in which the question here presented, or any closely resembling it, has arisen. Numerous cases have arisen in England where the question was, whether persons occupying land under particular agreements were liable to be rated as occupiers: See *Cory v. Bristow*, L. R. 2 App. Cas. 262; *Electric Telegraph Co. v. Overseers of Salford*, 11 Ex. 181; *Lancashire Telephone Co. v. Overseers of Manchester*, L. R. 14 Q. B. D. 267; *Watkins v. Overseers of Milton-next-Gravesend*, L. R. 3 Q. B. 350; *Forrest v. Overseers of Greenwich*, 8 El. & B. 890.

In *Selby v. Greaves*, L. R. 3 C. P. 594, the letting of a defined portion of a room in a factory with steam power for working lace-machines was held to be a demise; and in *Hancock v. Austin*, 14 C. B., N. S., 634, permission to place lace-machines in a room in a factory, and to work them with steam power furnished by the owner of the factory, was held to be a license, and to create no demise. The case last cited approaches nearest to the case at bar of any that we have seen, and in that the reasons for regarding the transaction as a lease are obviously stronger than in this case. That was permission to occupy with fixed machines a portion of the floor and space above it; this is permission to insert fastenings in the outer wall from which to suspend a sign in proximity to but outside of the building.

Judgments affirmed.

LEASE OF "STORE" IN BUILDING GIVES LESSEE RIGHT TO USE AND OCCUPATION OF OUTER WALLS belonging to that portion of the tenement, including the store, for the purpose of posting bills and notices thereon: *Riddle v. Littlefield*, 16 Am. Rep. 388. So the lease of a "building" conveys the land under the eaves, if that land be owned by the lessor: *Sherman v. Williams*, 18 Id. 522.

DALAY v. SAVAGE.

[145 MASSACHUSETTS, 88.]

LANDLORD IS LIABLE FOR INJURIES SUFFERED BY THIRD PERSONS LAWFULLY USING WAY, where he lets premises abutting upon the way, which, from their condition or construction, are dangerous to such persons, unless the tenant has agreed to put the premises in proper repair. GRANTEE, UNDER POWER OF SALE IN MORTGAGE, IS LIABLE FOR INJURIES SUFFERED BY PERSON WALKING ON SIDEWALK IN FRONT OF PREMISES, by reason of a defect in the cover of a coal-hole, existing, and open and visible, at the time of the sale, where the owner of the equity of redemption released any title he might have to the grantee, and remained in possession as a tenant at will, and was in occupation at the time of the injury.

TORT for personal injuries sustained by the plaintiff by falling into a coal-hole in the sidewalk in front of a house on a public street in Boston. The court ruled that the action could not be maintained, and ordered a verdict for the defendant. The plaintiff alleged exceptions. The facts are stated in the opinion.

P. O'Loughlin, for the plaintiff.

T. S. Dame, for the defendant.

By Court, FIELD, J. The defendant received a conveyance of the premises on November 3, 1883, having purchased them at a sale under a power contained in a mortgage. Breslin, on April 20, 1875, had become the owner of the equity of redemption, subject to this mortgage, and he occupied the premises from this date until after the accident, which, it was admitted at the argument, occurred on December 17, 1883.

On November 9, 1883, Breslin quitclaimed whatever title he had in the premises to the defendant, for which the defendant agreed to pay him twenty-five dollars, and Breslin remained in occupation, as the tenant at will of the defendant, under an agreement to pay rent at the rate of \$41.67 a month. There was evidence from which the jury might have found that the stone surrounding the cover of the coal-hole was permanently defective at the time the defendant became owner; that it con-

tinued in this defective condition until after the accident, and was of such a character that "the cover, on being stepped on, would tip up," whether it was tied or not on the inside; and that the accident happened, not through the negligent manner in which Breslin used the premises, but through the defective condition of the stone surrounding the cover of the coal-hole.

The defendant, as landlord, was under no obligation to Breslin to keep the coal-hole in repair, and Breslin was under no obligation to the defendant to repair it. It does not appear in the exceptions that the defendant at any time knew that the coal-hole was in a defective and dangerous condition.

It seems to be settled that if a landlord lets premises abutting upon a way, which are from their condition or construction dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair. That the tenant may also be liable is not a defense for the landlord.

The case which perhaps most nearly resembles this is *Gandy v. Jubber*, 5 Best & S. 78; S. C. in the exchequer chamber, 5 Id. 485. The reasons why the court of exchequer chamber recommended that the plaintiffs, who had recovered judgment in the queen's bench, should consent that the proceedings be stayed, do not appear in the report; but in 9 Id. 15, there is what purports to be the undelivered judgment of that court in the case. One question was, whether a landlord who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the course of the argument in the exchequer chamber, Chief Justice Erle said of the landlord's liability: "If he lets the premises with a nuisance, all parties agree that he is responsible." In the opinion published in 9 Best & S. 15, the grounds on which the court of exchequer chamber differed from that of the queen's bench distinctly appear as follows: "We agree that to bring liability home to the owner, the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is, that a landlord from year to year having the power of giv-

ing the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such forbearing to give notice is equivalent to a reletting."

The reason of the rule that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injuries suffered therefrom, is, that by the letting he has authorized the continuance of the nuisance.

Pretty v. Bickmore, L. R. 8 C. P. 401, was decided on the ground that the tenant had covenanted to keep the premises in repair, and therefore the landlord could not be said to have given authority that the premises should be kept in a dangerous state: *Gwinnell v. Eamer*, L. R. 10 C. P. 658, follows *Pretty v. Bickmore*, *supra*. See also *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76.

In *Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. D. 311, it is expressly said that if the landlord lets premises in a ruinous condition, he is liable to strangers.

In *Saltonstall v. Banker*, 8 Gray, 195, 197, the decisions in *Rich v. Basterfield*, 4 C. B. 783, and in *King v. Pedley*, 1 Ad. & E. 822, are approved, and it is said that if the nuisance existed at the time of the demise, the landlord is liable: See also *Todd v. Flight*, 9 Com. B., N. S., 377.

In *Jackman v. Arlington Mills*, 137 Mass. 277, the landlord was held liable for the acts of his tenants in polluting the water of a brook by discharging into it the sink-water from the houses let, and the reason given was, that the houses let were intended to be used by the tenants in the manner in which they were used, and that if the landlord did not retain the control of the water used by the tenants, he had by the letting authorized the use which the tenants made of the water: See also *Owings v. Jones*, 9 Md. 108; *Peoria v. Simpson*, 110 Ill. 294, 300; 51 Am. Rep. 683; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Durant v. Palmer*, 29 N. J. L. 544.

An attempt has been made to bring the present case within the rule that if the nuisance is created by a tenant, or by a former owner who has let the premises to a tenant, a grantee is not liable for any injury that may result from the condition of the premises while the occupation of the tenant continues. If the defendant had bought the premises subject to a lease to Breslin, who had continued in occupation under it, a different case would have been presented. But when the defendant purchased the premises, and a deed was delivered to him by the

mortgagee, pursuant to the power of sale contained in the mortgage, he became the owner, and Breslin had no longer the right of occupation. The defendant could then have immediately taken possession. After this the defendant voluntarily let the premises to Breslin as a tenant at will, and at the time of the accident, Breslin held possession by agreement with the defendant. It is strictly a case where the defendant let premises with a nuisance upon them, and took no agreement from the tenant to abate the nuisance, or to repair the premises. So far as appears, the plaintiff was lawfully traveling upon the highway, and if the coal-hole was in a permanently dangerous condition, and this condition existed when the defendant let the premises, the landlord is not excused from liability by the fact that the premises were in the occupation of a tenant at the time when the plaintiff was injured.

It is not necessary to determine whether the owner or occupant in his relations to the public is bound at all events to keep the covering of a coal-hole in a public street safe, or is only bound to use reasonable care. There was evidence that the defect in the covering of the coal-hole had existed for a long time, and was open and visible, and such that the person whose duty it was to repair it ought to have known its condition.

In the opinion of a majority of the court, the exceptions must be sustained.

Exceptions sustained.

LIABILITY OF LANDLORD TO THIRD PERSON FOR DEFECTIVE CONDITION OR CONSTRUCTION OF PREMISES: See *City of Lowell v. Spaulding*, 50 Am. Dec. 775, and note; *Godley v. Hagerty*, 59 Id. 731, and note; *Carson v. Godley*, 67 Id. 404; *Kirby v. Boylston Market Association*, 74 Id. 682, and note; *Inhabitants of Milford v. Holbrook*, 85 Id. 735, and note; note to *Polack v. Pioche*, 95 Id. 123; *Shipley v. Fifty Associates*, 3 Am. Rep. 346; 8 Id. 318; *Fisher v. Thirkell*, 4 Id. 422; *Irvine v. Wood*, 10 Id. 603; *Leonard v. Storer*, 15 Id. 76, and note; *Clancey v. Byrne*, 15 Id. 391, and note; *Jaffe v. Harteau*, 15 Id. 438; *Campbell v. Portland Sugar Co.*, 16 Id. 503; *Swords v. Edgar*, 17 Id. 295; *Burdick v. Cheadle*, 20 Id. 767; *Helwig v. Jordan*, 21 Id. 189; *Shindelbeck v. Moon*, 30 Id. 584, 585; *Mellen v. Morrill*, 30 Id. 695; *Nash v. Minneapolis Mill Co.*, 31 Id. 349; *Camp v. Wood*, 32 Id. 282; *Ryan v. Wilson*, 41 Id. 384; *Edwards v. New York etc. R. R.*, 50 Id. 659; *Ingwersen v. Rankin*, 54 Id. 109; *Wolf v. Kilpatrick*, 54 Id. 672; *Kalis v. Shattuck*, 58 Id. 568; *Albert v. State*, 59 Id. 159; *Pierce v. Savings Society*, ante, p. 45; and as to the tenant's liability, see note to *City of Lowell v. Spaulding*, 50 Am. Dec. 782; note to *Godley v. Hagerty*, 59 Id. 733; *City of Boston v. Worthington*, 71 Id. 678; *Fisher v. Thirkell*, 4 Am. Rep. 422; *Irvine v. Wood*, 10 Id. 603; *Leonard v. Storer*, 15 Id. 76; *Clancey v. Byrne*, 15 Id. 391, and note; *Shindelbeck v. Moon*, 30 Id. 584; *Hussey v. Ryan*, 54 Id. 772; *Donaldson v. Wilson*, post, p. 487.

LIABILITY OF LAND-OWNER IN GENERAL FOR DEFECTIVE OR DANGEROUS CONDITION OF SIDEWALK: See note to *Brouning v. City of Springfield*, 63 Am. Dec. 355; *Congreve v. Morgan*, 72 Id. 495, and note; *Kirby v. Boylston Market Association*, 74 Id. 682, and note; *Flynn v. Canton Co.*, 17 Am. Rep. 603; *Heency v. Sprague*, 23 Id. 502; *Harrison v. Collins*, 27 Id. 699; *Ryan v. Curran*, 31 Id. 123; *Morton v. Smith*, 33 Id. 811; *City of Keokuk v. Independent District of Keokuk*, 36 Id. 226; *Taylor v. Lake Shore etc. R. R.*, 40 Id. 457; *Wenlick v. McCotter*, 41 Id. 358; *Moore v. Gadsden*, 41 Id. 352; *City of Peoria v. Simpson*, 51 Id. 683; *Welsh v. Wilson*, 54 Id. 698; *Calder v. Smalley*, 55 Id. 270 (scuttle-hole).

PIERCE v. EQUITABLE LIFE ASSURANCE SOCIETY.

[145 MASSACHUSETTS, 56.]

INSURANCE COMPANY, INCORPORATED IN ONE STATE, WAIVES ANY OBJECTION TO EXERCISE OF JURISDICTION BY COURTS OF ANOTHER STATE, by appearing generally and answering to the merits, in a suit in equity against it, brought by a resident of the former state, who had there taken out a policy on the tontine savings fund assurance plan, to obtain an account of the surplus or profits derived from such policies as should cease to be in force before the completion of their respective tontine periods, which were to be apportioned equitably among such policies as should complete such periods.

INSURANCE COMPANY DOES NOT HOLD SURPLUS OR PROFITS AS TRUST FUND for the benefit of the holders of policies on the tontine savings fund assurance plan, under the New York law, where, by its policies, it agrees that the surplus or profits derived from such policies as shall cease to be in force before the completion of their respective tontine dividend periods shall be appointed equitably among such policies as shall complete such periods.

BILL IN EQUITY CAN BE MAINTAINED AGAINST INSURANCE COMPANY BY HOLDER OF TONTINE POLICY, who is to be regarded as a creditor, and not a member of the corporation, and without joining the other policyholders of his class, or suing on their behalf, to obtain an account of the surplus or profits derived from such policies as should cease to be in force before the completion of their respective tontine periods, which were to be apportioned equitably among such policies as should complete such periods, although the defendant is incorporated in another state, outside of which it is a great inconvenience for it to account, but not an insuperable one, it having a place of business, and an agent to receive service of process in the state where the suit is brought, and it having waived any objection to the exercise of the jurisdiction of the court by appearing generally and answering to the merits.

BILL in equity by the holder of a policy of life insurance on the tontine savings fund plan, issued by the defendant, alleging that by the terms of the policy the defendant had constituted itself a trustee of his share of the accumulations of a certain fund, and praying for an account. The facts are stated in the opinion.

E. P. Usher, for the plaintiff.

J. Lowell and R. M. Morse, Jr., for the defendant

By Court, DEVENS, J. The policy of life insurance, in regard to which the plaintiff seeks that the defendant shall render an account, complaining that the defendant has not apportioned to him the share of reserve and profits to which he is entitled, was made in New York; and the plaintiff is, and was at the time of bringing this bill, a resident of that state, under the laws of which the defendant is incorporated. Had the defendant, instead of appearing generally, objected originally that, even if an account should be taken, it ought not to be held to answer here to the plaintiff, in view of these facts, and the great inconvenience involved in taking such an account at a distance from the state in which its voluminous books and papers are properly kept, such objection would have been worthy of serious consideration. Even if the plaintiff is entitled to an account, he might, under such circumstances, be compelled to seek it where it can most appropriately, as well as most conveniently, be rendered. The objection which the defendant makes to the jurisdiction of the court appears to have been taken for the first time when the case came on to be heard on its merits before a single justice. In the opinion of a majority of the court, any objection to the exercise of the jurisdiction of this court, founded on the facts above set forth, must be deemed to have been waived by the general appearance, pleading to the merits, and the delay in taking the objection.

The principal characteristics of the policy on which the controversy arises are these: It was for the sum of ten thousand dollars, payable, on the decease of the plaintiff, to him, his executors, administrators, or assigns, and was for the term of his life. It was known as a tontine policy, on the savings insurance plan, and was to continue as such for the term of ten years, if the plaintiff should live so long. If the holder of the policy died during the tontine period, which expired on March 18, 1883, his estate would not receive any benefit from the dividends which ordinarily are made on life assurance policies annually or at stated periods; which dividends consist of the surplus of premiums after deducting the cost of insurance and the computed reserve, these being then held by the company for the benefit of the other policy-holders, and forfeited by him. His estate would receive only the amount

of his policy. If the holder of the policy also should fail during this tontine term to keep up his policy by payment of the premiums, it would be forfeited. Policies of this character are kept in classes of ten, fifteen, or twenty years, according to their tontine periods; and while the funds of each class are not kept separate, distinct accounts are kept with each class, so as to show the amount to which it is entitled, and by this means the amount due upon each policy at the expiration of its tontine term. At the expiration of ten years, if such be the term, or at the completion of the tontine dividend period, it is provided that "all surplus or profits derived from such policies on the tontine savings fund assurance plan as shall cease to be in force before the completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods." On March 18, 1883, the policy not having terminated, the plaintiff had the option, — "1. To withdraw, in cash, this policy's entire share of the assets, whether in the reserve fund proper, or in the accumulated surplus; 2. To convert the same into a paid-up policy for an equivalent amount; . . . or 3. To continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy."

The "reserve fund proper" and "accumulated surplus" are made up of the dividends which have been withheld on the premiums of the class during ten years, the dividends thus withheld from those who have died within the ten years being forfeited for the benefit of the class to which their policy belonged, and also all payments made by and dividends withheld from those who have forfeited their policies by non-payment of premiums.

It is the contention of the defendant that the plaintiff is bound by the apportionment made by its officers in the discharge of their duties, unless it shall be shown at least that they did not act in the exercise of an honest discretion, and in good faith. We find no words in the policy indicating that the decision of the defendant is to be conclusive; and the words by which the defendant agrees "equitably" to apportion to the plaintiff's policy its share of the profits bind the defendant to make the apportionment, and imply that, in any proper proceeding, it may be inquired whether it has fulfilled this part of its contract.

That the bill brought by the plaintiff cannot be maintained on the ground that he is the beneficiary of a trust fund held by the defendant, which is one of the grounds upon which an account is often ordered, and upon which theory the bill is based, is, we think, reasonably clear. By the New York law, which must govern the construction of a contract made between New York parties to be performed in that state, it has been found as a fact by the judge who presided that the policy issued to the plaintiff did not create a trust. This finding is fully sustained by the evidence from the decisions of the tribunals of that state: *Taylor v. Charter Oak Ins. Co.*, 9 Daly, 489; *Hencken v. United States Ins. Co.*, 11 Id. 282; 98 N. Y. 627; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *People v. Security L. Ins. etc. Co.*, 78 N. Y. 114; 34 Am. Rep. 522; *Bewley v. Equitable Assurance Society*, 61 How. Pr. 344; *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522; *St. John v. American Ins. Co.*, 13 N. Y. 31; *Uhlmann v. New York Ins. Co.*, 13 Daly, 47. While the prayers in the plaintiff's bill have been made upon the theory that there was a trust fund held by the defendant for the benefit of the plaintiff, with others, as a holder of a ten years' tontine policy, no objection is pressed by reason of the form of the bill. We proceed to consider, therefore, whether, upon any other ground than that strictly of trust, the bill may be maintained for an account.

Our statute gives jurisdiction in equity upon accounts "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law": Pub. Stats., c. 151, sec. 2, cl. 10. Even if the amounts kept back from the plaintiff, and those of his class of policy-holders, by the retention of those dividends which would otherwise have been received, or of those sums accruing from the forfeiture of policies either in whole or in part, do not constitute a trust fund, or place the defendant in a strictly fiduciary capacity, the defendant was bound to keep accurate accounts of them, and of all interest and profit thereon, if any. All the facts were entirely within its own knowledge, and it is only thus that it can be determined what equitably should be apportioned to the plaintiff.

It is said that the plaintiff has a sufficient remedy at common law; that he can bring his action at law; and that upon proper interrogatories addressed to the defendant, all the information necessary for the proper adjustment of the account may be obtained. But even if an action at law could be

maintained, where an account is complicated, so that a full examination and settlement of previous accounts, transactions, or methods of business are necessary, and where the whole matter is entirely within the knowledge of the defendant, it cannot so conveniently or accurately be investigated at common law as in equity. Even if a trial by jury be claimed and allowed, the court might, in a suit in equity, so mold the issues and direct the course of the trial as to avoid many of the difficulties attending a trial at common law: *Hallett v. Cumston*, 110 Mass. 32. It was thus held in the case cited that one who was not a partner, but was entitled to share in the net profits of a business, might maintain a bill for an account against a partnership which necessarily involved an examination of its transactions, and of its whole course and methods of conducting business. In *Massachusetts General Hospital v. State Mut. L. Assurance Co.*, 4 Gray, 227, it was said that the plaintiff might properly maintain a bill for an account of the net profits arising from the insurance of lives made by it, one third of which the defendant was by law bound to pay the plaintiff.

That the accounts are singularly complicated, and that the method by which the value of the share of the plaintiff which he has obtained by full payment of his premiums and completion of his tontine period is ascertained is one of much complexity and difficulty in its application, appear from the evidence reported. A court of equity is the appropriate tribunal for dealing with such an account, and the defendant is fairly bound to produce an account from the *data* in its possession which shall show that it has complied with its promise equitably to apportion to the plaintiff his share in the accumulations made through the operation of the tontine provisions in his policy.

Nor do we perceive that it is necessary to join any more of this class of policy-holders in the bill, or that the bill should be brought on their behalf. It appears by the answer of the defendant, and also by the evidence, that all the policy-holders of the class to which the plaintiff belonged have been settled with, and that they have received the amount apportioned to them by the defendant corporation. But even if it did not so appear, the plaintiff made his individual contract with the defendant; if others have similar contracts depending on similar states of fact, they in no way affect his contract; he has no demand upon *any one* other than the defendant; and noth-

ing that he will receive from the defendant will in any way affect the claims of others.

It is contended that the apportionment of the reserve or accumulated profits to be made at the conclusion of the tontine dividend period is but the declaration of a dividend; that the court will not interfere with the declaration of a dividend, even by a domestic corporation, it being a question solely for its directors, or other proper officers, whether any dividend shall be paid made, and if so, of what amount; and that, until this is made, no stockholder has any rights in any profits that have been made, or assets that might be divided. Conceding this to be the general law, the amount to be apportioned, or which the plaintiff is entitled to have apportioned, is not a dividend, in the limited sense in which the word is used in its application to dividends to stockholders. Between stockholders and the corporation of which they are members, no relation of debtor or creditor ordinarily exists; nor does any arise until a dividend has been declared. The affairs of the corporation are managed by those whom the stockholders elect as officers; and by this administration of affairs they are bound. The plaintiff is not a member of the corporation, but its creditor, who has contracted with it. At the end of a fixed period, having complied with the contract on his own behalf, and made the payments required, he is entitled to have apportioned to him his share of a certain fund to be computed. The defendant has no right to withhold it as a corporation may withhold profits from a stockholder. This share, or its equivalent in value, is the plaintiff's own property, and not that of the defendant corporation.

Nor is it important that the sum to be computed as belonging to the class, and from which the apportionment to the plaintiff's policy is to be made, is constituted partially of dividends which, but for the tontine contract, would have been previously paid upon the policy. It may be that the amount of the dividends annually, or at other stated intervals, distributed to policy-holders, could be absolutely determined by the officers of the corporation. If this is so, the plaintiff would still have a right to an account, and to ascertain whether the dividends reserved under his contract were proportionally the same as those declared on other life insurance policies, having relation to their different circumstances; or at least to ascertain what were the amounts reserved as *dividends* to be passed to the credit of the fund when it should

be computed, if it had no actual existence. In our view of the case, if the defendant were a domestic corporation, there would be a right on the part of the plaintiff to have an account taken, and to ascertain thereby whether a fair apportionment had been made. If the defendant had kept no account, if it had no means of furnishing one, or showing whether it had dealt justly or unjustly with the plaintiff, it should be answerable for the injury which it had occasioned by its neglect to do what the contract implies it would do.

The defendant is, however, a foreign corporation; and it is urged that this court ought not to take jurisdiction of the case, if it were possible so to do, and that practically it is impossible for it to effect justice between the parties.

That it is a matter of grave inconvenience to the defendant to be held to account here may be conceded. That if the objection had been promptly taken that the plaintiff was a resident of New York as well as the defendant, it would have received serious consideration, we have heretofore suggested: *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336. But we find no inconvenience that is insuperable; the defendant has an established place of business in this commonwealth, and an agent to receive service of lawful process. It may be presumed that it anticipates that the profits of the business will compensate for the inconvenience of being held to answer, and in a proper case, to account, in a state other than that to which it owes its corporate existence. It is true that we cannot bring the officers, or the books, or the assets, of this corporation within our jurisdiction, but the corporation is itself lawfully before us. We shall not assume that it will neglect any order that we may pass, nor indicate how such order may be enforced; or, if it cannot be enforced, how such proceedings may be had that the plaintiff may be indemnified for the violation of the contract made with him.

It is further objected that the case requires us to exercise a jurisdiction over the corporation in its corporate functions, in the matter of its internal economy, and in the relations existing between it and its policy-holders. The statute under which this corporation is subjected to the service of process does not, it is true, necessarily bring the subject-matter of the suit, or the remedy sought, within the jurisdiction of this court; nor do the rights and liabilities of parties under local laws necessarily follow them into other jurisdictions: *Smith v. Mutual Life Ins. Co.*, *supra*. Did the inquiry before us concern

the relation between the defendant corporation and its stockholders, we could not undertake to pass upon or determine it: *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349. Such an inquiry is to be determined by the local tribunal. Were the case such that we were called upon to pass any order directing or controlling the corporation in the exercise of its corporate duties, we have no such jurisdiction as would enable us to do it. The subject-matter would not be within our province.

But in the case at bar, the plaintiff is a creditor and not a member of the corporation. He has a contract with it which he contends the corporation has not fairly performed. There is no question of its internal economy involved, as where the relations between its members and the corporation are concerned. If it has adopted any method of conducting its business inconsistent with the due performance of its contracts, such a method of administration will not deprive the plaintiff of any rights. It can no more refuse to account than could an individual to whom the plaintiff intrusted his moneys on any similar contract. In dealing with the plaintiff, the corporation dealt with an outside person, and only the relation which it bears to such person, claiming to be its creditor, is here involved.

The questions whether, if the defendant is to account, on what principles it shall do so, or whether, if the case is submitted to a master, it shall be so submitted by an order which shall direct him how the account shall be taken, have not been discussed, and are not considered. It may be that fuller evidence may be required than has yet been taken before they can be disposed of.

Decree for an account.

LIFE INSURANCE COMPANY SUSTAINS WHAT RELATION TO POLICY-HOLDERS: See *Cohen v. New York Mutual Life Ins. Co.*, 10 Am. Rep. 522, 533; *People v. Security Life Ins. etc. Co.*, 34 Id. 522.

EQUITY WILL ENTERTAIN BILL FOR ACCOUNTING, although there may be a remedy at law, if the legal remedy be doubtful or inadequate: *Ludlow v. Simond*, 2 Am. Dec. 291; compare *Smiley v. Bell*, 17 Id. 813; *Lesley v. Rosson*, 77 Id. 679.

STOCKHOLDERS' RIGHTS AND REMEDIES WITH RESPECT TO DIVIDENDS: See note to *Goodwin v. Hardy*, 99 Am. Dec. 761, where the subject is discussed.

SERVICE OF PROCESS ON FOREIGN CORPORATIONS: See note to *Hampson v. Weare*, 66 Am. Dec. 121, where the question is considered.

BLISS v. INHABITANTS OF SOUTH HADLEY.

[145 MASSACHUSETTS, 91.]

PARENTS OR BROTHER OF CHILD CANNOT BE SAID TO HAVE BEEN NEGLIGENCE AS MATTER OF LAW, in an action against a town to recover damages for the death of the child caused by a defect in a street, where the child, one year and ten months old, was sent by his mother into the street for air and exercise, in charge of his brother eight years old, who was accustomed to take him out, and while the children were standing in the street watching other boys at play, the younger child, unnoticed by the elder, started across the street, and upon being seen, called at, and run after by the elder, ran, fell, and rolled into a gutter, which had been filled with water for some time by reason of an obstructed culvert, the condition of which was known to the parents and the elder brother, receiving injuries which caused his death.

CHILDREN SENT INTO STREET BY PARENTS FOR AIR AND EXERCISE MAY BE PROPERLY FOUND TO BE TRAVELERS by the jury, in an action against a town to recover damages for the death of one of them caused by a defect in the street, although they stopped for a few minutes to watch other boys at play.

TORT, under the Massachusetts Public Statutes, chapter 52, section 17, by Willard M. Bliss, as administrator of his infant child Frank, to recover damages for the death of the child, occasioned by an alleged defect in a street in South Hadley. It appeared from the evidence that on the morning of April 22, 1885, the child, who was one year and ten months old, was sent by his mother into the street for air and exercise, in charge of his brother Leon, eight years old, who had been accustomed to take him out. The children stood in the street for a time, watching two other boys at play. Leon did not have hold of Frank's hand. Frank, without being noticed by Leon, started across the street alone. Leon saw him, called to him, and ran after him, when Frank ran, fell down, and rolled into a gutter between the worked roadway and the sidewalk, which had been filled with water for some time by reason of an obstructed culvert, and received injuries which caused his death soon after. Both parents knew of the existence of the water, and that the place was a dangerous one for children. Leon also knew of its existence. The defendant requested the court to rule that there was no evidence that the plaintiff's intestate was in the exercise of due care; that there was no evidence that he was a traveler on the highway; and that on all the evidence on these points the plaintiff could not recover; but the rulings were refused and the case submitted to the jury. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

D. W. Bond, for the plaintiff.

J. C. Hammond, for the defendant.

By Court, MORTON, C. J. It cannot be said, as matter of law, that it was negligence on the part of the parents of the intestate to send him into the street for air and exercise in the charge of his brother Leon, who was eight years old. It was a question of fact, depending upon how much the street was used, and upon the intelligence, capacity, and experience of Leon, and was properly submitted to the jury. The evidence does not disclose any decisive act of negligence on the part of Leon, and it was for the jury to determine whether he was exercising reasonable diligence in the care of his infant brother.

It was competent for the jury to find that the boys were travelers. They were using the street for air and exercise. The fact that they stopped for a few minutes to watch other boys at play was one of the natural and ordinary incidents of travel, and did not divest them of their rights as travelers: *Gulline v. Lowell*, 144 Mass. 491; 59 Am. Rep. 102.

Exceptions overruled.

LIABILITY OF MUNICIPAL CORPORATION FOR INJURY TO CHILD PLAYING IN STREET, FROM ITS DEFECTIVE CONDITION: See *Stinson v. City of Gardiner*, 66 Am. Dec. 281; *City of Chicago v. Starr*, 88 Id. 422; *City of Chicago v. Hesing*, 25 Am. Rep. 378; *Gavin v. City of Chicago*, 37 Id. 99; *City of Chicago v. Keefe*, 55 Id. 860, and note; *City of Indianapolis v. Emmelman*, 58 Id. 65; *Kuns v. City of Troy*, 59 Id. 508; *Gulline v. Lowell*, 59 Id. 102, 103.

PARENTS' PERMITTING CHILD TO BE IN STREET, EFFECT OF, IN GENERAL, IF CHILD IS INJURED: See *Hartfield v. Roper*, 34 Am. Dec. 273, and note; *Robinson v. Cone*, 54 Id. 67; note to *Freer v. Cameron*, 55 Id. 677; *Smith v. O'Connor*, 86 Id. 582; *Pittsburgh etc. R'y v. Vining's Adm'r*, 92 Id. 269; *Pittsburgh etc. R'y v. Bumstead*, 95 Id. 539; *Mulligan v. Curtis*, 97 Id. 121; *Bellefontaine etc. R. R. v. Snyder*, 98 Id. 175; *Mangam v. Brooklyn R. R.*, 98 Id. 66; *Kay v. Pennsylvania R. R.*, 3 Am. Rep. 628; *Lynch v. Smith*, 6 Id. 188; *Ihl v. Forty-second etc. R. R.*, 7 Id. 450; *Congreve v. Ogden*, 10 Id. 361; *Smith v. Hestonville etc. R'y*, 37 Id. 705.

BASSETT v. CONNECTICUT RIVER RAILROAD Co.

[145 MASSACHUSETTS, 129.]

RAILROAD CORPORATION IS NOT LIABLE FOR GOODS DESTROYED BY FIRE while in its possession under a contract of carriage, under the Massachusetts Public Statutes, chapter 112, section 214, which provides that a railroad corporation shall be responsible in damages to a person whose buildings or other property may be injured by fire communicated by its locomotive-engines.

TORT for the loss of goods by fire communicated by a locomotive-engine, under the Public Statutes, chapter 112, section 214, which provides: "Every railroad corporation and street railway company shall be responsible in damages to a person or corporation whose buildings or other property may be injured by fire communicated by its locomotive-engines, and shall have an insurable interest in the property upon its route, for which it may be so held responsible, and may procure insurance thereon in its own behalf." On March 30, 1887, the freight-depot of the defendant at Chicopee, with its contents, including the plaintiff's household goods, was destroyed by fire communicated from a locomotive-engine. The goods had been placed on board the cars at Providence, Rhode Island, for transportation to Chicopee. They arrived at Chicopee, March 26th, and were taken from the cars on the afternoon of that day by the servants of the defendant, and placed in the freight-depot, where they remained until the building and its contents were destroyed by fire. The plaintiff had no notice from the company whatever of the arrival of the goods, but was told by a teamster, who wished the job of removing them, that they had arrived. The court gave judgment for the defendant upon the foregoing facts.

L. White, for the plaintiff.

G. Wells and G. M. Stearns, for the defendant.

By Court, KNOWLTON, J. The plaintiff lost his goods by fire in the defendant's freight-house, and he seeks to recover their value under the Public Statutes, chapter 112, section 214. The statute invoked is remedial, and has been liberally construed in favor of those for whose benefit it was enacted. The decisions indicate that it applies to property of every kind, and in any place where fire may be communicated by a locomotive-engine: *Hart v. Western R. R.*, 13 Met. 99; 46 Am. Dec. 719; *Lyman v. Boston and Worcester R. R.*, 4 Cush. 288; *Trask*

v. *Hartford and New Haven R. R.*, 16 Gray, 71; *Ross v. Boston and Worcester R. R.*, 6 Allen, 87; *Quigley v. Stockbridge and Pittsfield R. R.*, 8 Id. 438. But it has never been held that it includes within its provisions articles placed in the possession of a railroad corporation by their owner, under a contract which fully covers the rights and liabilities of both parties regarding them. When parties see fit to stipulate what their relations shall be touching any matter, their stipulations fix their rights and liabilities, and exclude what is not fairly included in them. The statute referred to gives protection to owners of property who have made no arrangement with the railroad corporation about it. It was not intended to prevent the making of contracts by property owners with railroad corporations, determining their respective rights and duties in relation to particular property, or to apply to cases where such contracts have been made. Nor is there any difference in this regard between express and implied contracts. If a railroad corporation and an owner of land or personal property make an arrangement about it from which the law implies a contract broad enough to cover the subject of liability for loss or injury, this contract, implied from their voluntary act, fixes their rights, and excludes the provisions of a statute intended for cases not covered by a contract.

The plaintiff had employed the defendant as a common carrier to transport his goods to Chicopee. He voluntarily entered into an arrangement which involved the subject of the defendant's liability for loss of the property, or injury to it from any cause, and which determined his rights as definitely, under the contract implied by law, as if the parties had written out and signed stipulations in detail. The defendant was bound to carry the goods, and was an insurer of them until the transit ended, and was then liable as a warehouseman for any want of ordinary care during such reasonable time as they should remain in its custody awaiting the call of the consignee. This was the extent of its liability. In the language of Chief Justice Shaw, such an arrangement "we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage as for the carriage": *Norway Plains Co. v. Boston and Maine R. R.*, 1 Gray, 263, 272; 61 Am. Dec. 423. The goods having been destroyed while in the possession of the defendant under this contract, the plaintiff must

seek his remedy under it, and the statute referred to does not apply.

Judgment affirmed.

The case of *Blaisdell v. Connecticut River Railroad Co.*, 145 Mass. 132, was also an action of tort under the Massachusetts Public Statutes, chapter 112, section 214, for the loss of goods by fire communicated by a locomotive-engine. The principal case having established the proposition that a railroad corporation was not liable, under the statute, for goods destroyed by fire while in its possession under a contract of carriage, the question was, whether the plaintiffs' property in this case was in the defendant's possession at the time of the fire under such a contract. The opinion of the court, by Knowlton, J., is as follows: "The plaintiffs were large shippers of merchandise over the defendant's road, and the defendant built for their use, as an addition to its depot, a storehouse separated from the general freight-house by a brick wall. This the plaintiffs had occupied for two years in connection with their business, and up to October 1, 1886, they had paid an agreed price per month for it. It can hardly be contended that, during this period, they were not the defendant's tenants, and in exclusive possession and control of all that the storehouse contained. On September 21, 1886, they notified the defendant that, by reason of the completion of a new building elsewhere, they should not need the storehouse after October 1st. On November 1st following, the station agent at Chicopee presented them a bill for the rent of the premises for the month of October, which had been sent him for collection by the defendant's auditor, in accordance with a usual practice, and without special directions from the president or superintendent regarding it. The plaintiffs declined to pay it, referring to their previous notification, and no bill was afterwards sent. The station-agent informed the superintendent by letter of their refusal, and of their saying that 'they would pay no more rent for the storehouse, thinking they should have it free now, and would keep the cars cleaned out.' He also inquired if there was any error in sending the bill, and asked the superintendent to advise the plaintiffs of the company's position. No reply was sent to the agent, nor communication to the plaintiffs, and they continued until the time of the fire, in March, 1887, 'to use and occupy the storehouse in the same manner and for the same purposes as before, which use was known by the station-agent, but the agent did not know whether or not any arrangement had been made with the president or superintendent for such use, but such use was without any objection on the defendant's part, and no other persons used the storehouse.' The property destroyed 'had been received by the plaintiffs in the course of their said business by or for transportation.'

"Upon these facts, the plaintiffs were in possession and control of the property in the storehouse as well after as before October 1, 1886. The goods which had come over the defendant's road had been 'received' by the plaintiffs, and kept in the storehouse, some of them a day or two at the time of the fire, and some of them for months. There is nothing to indicate that the contract under which the defendant carried them had not been fully performed, and so far as appears, the defendant did not seek to retain a lien upon them, but allowed the plaintiffs to take them into their absolute control; and the facts do not find that the goods in the storehouse 'received by the plaintiffs' for transportation had ever been delivered to the defendant so that the parties had come into relations of contract regarding them. The

defendant did not use the storehouse, nor have the custody of anything in it. It is quite immaterial whether the relation of landlord and tenant continued to exist between the parties, or whether the plaintiffs, after receiving freight which had been transported over the defendant's railroad, left it in one of the defendant's buildings by sufferance. The test question is as to the goods which had been transported over the railroad, whether they had been given up to the owner so that the contract of carriage, and incidentally for storage for a reasonable time or until delivery, no longer applied to them; and as to those which were intended for transportation, whether they had been delivered to the corporation so that the contemplated contract had taken effect." The property having been destroyed by fire communicated by a locomotive-engine of the defendant, and not having been at the time in the possession of the defendant under a contract fixing the rights and liabilities of the parties regarding it, the plaintiffs were held entitled to recover.

RAILROAD COMPANY'S LIABILITY FOR FIRE COMMUNICATED BY LOCOMOTIVE-ENGINES IN GENERAL: See *Perley v. Eastern R. R.*, 96 Am. Dec. 645, and note 649, 650, collecting prior cases; *Martin v. Western Union R. R.*, 99 Id. 189, and note; *Louisville etc. R'y v. Richardson*, 32 Am. Rep. 94, and note digesting prior cases; *Marquette etc. R. R. v. Spear*, 38 Id. 242; *Richmond etc. R. R. v. Medley*, 40 Id. 734; *Pittsburgh etc. R'y v. Jones*, 44 Id. 334, and note; *Simmonds v. New York etc. R. R.*, 52 Id. 587.

FAIRBANKS v. SNOW.

[145 MASSACHUSETTS, 158.]

DURESS BY HUSBAND IS NO DEFENSE IN ACTION BY PAYEE AGAINST WIFE on a promissory note executed by her, if the payee took the note in ignorance thereof.

ACTION on a promissory note. The opinion states the facts.

W. S. B. Hopkins and S. Haynes, for the plaintiff.

A. Norcross, H. C. Hartwell, and C. F. Baker, for the defendant.

By Court, **HOLMES, J.** This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats on the part of her husband. The judge below found for the plaintiff, on the ground, it would rather seem, that, whether there was duress or not, the defendant had ratified the note, which there seems to have been evidence tending to prove: See *Morse v. Wheeler*, 4 Allen, 570; *Rau v. Von Zedlitz*, 132 Mass. 164. But as this may not be quite clear, we proceed to consider the only exception taken by the defendant. The judge refused to rule that, if the defendant signed the note under duress, it was immaterial

whether the plaintiff knew, when he received the note, that it was so signed. The exception is to this refusal.

No doubt if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground: *Barry v. Equitable Life Assurance Society*, 59 N. Y. 587, 591. But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable: *Foss v. Hildreth*, 10 Allen, 76, 80; *Vinton v. King*, 4 Id. 562, 565; *Lewis v. Bannister*, 16 Gray, 500; *Fisher v. Shattuck*, 17 Pick. 252; *Worcester v. Eaton*, 13 Mass. 371, 375; 7 Am. Dec. 155; *Whelpdale's Case*, 5 Coke, 119 a; 1 Bla. Com. 130.

This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus volui*; D. 4. 2. 21, sec. 5; see 1 Windscheid, Pandekten, sec. 80.

Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud; and is, that whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action: See *Rodliff v. Dallinger*, 141 Mass. 1, 6; 55 Am. Rep. 439; *Stiff v. Keith*, 143 Mass. 224. But if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant: *Master v. Miller*, 4 Term Rep. 320, 338; *Masters v. Ibberson*, 8 Com. B. 100; *Sturge v. Starr*, 2 Myl. & K. 195; *Pulsford v. Richards*, 17 Beav. 87, 95; *White v. Graves*, 107 Mass. 325; 9 Am. Rep. 38.

The authorities with regard to duress, however, are not quite so clear. It is said in *Thoroughgood's Case*, 2 Coke, 9, that "if a stranger menace A to make a deed to B, A shall avoid the

deed which he made by such threats, as well as if B himself had threatened him, as it is adjudged 45 Edw. III., 6." *Sheppard Touchstone*, 61, is to like effect. See also *Fowler v. Buttery*, 78 N. Y. 68; 34 Am. Rep. 507. But in *Year Book*, 43 Edw. III., 6, pl. 15, which we suppose to be the case referred to, it was alleged that the defendant was imprisoned by the procurement of the plaintiff. And we know of no distinct adjudication of binding authority that mere threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them.

In *Keilway*, 154 a, pl. 3, "the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment [on the part] of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress."

In *Taylor v. Jaques*, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note "under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested," etc.: See *Green v. Scranage*, 19 Iowa. 461, 466; 87 Am. Dec. 447; *Talley v. Robinson*, 22 Gratt. 888; *Bazemore v. Freeman*, 58 Ga. 276, and the cases as to purchasers for value; *Clark v. Pease*, 41 N. H. 414; *Duncan v. Scott*, 1 Camp. 100. See also *Gilbert v. Stone*, Aley, 35; *Style*, 72; *Scott v. Shepherd*, 2 W. Black. 892, 896.

Loomis v. Ruck, 56 N. Y. 462, was decided on the ground that if the non-negotiable note in suit was in the first instance a contract between the plaintiff and the defendant, it was obtained through the agency of the defendant's husband in such a way as to make the plaintiff answerable for his conduct. Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, etc., by the party's own hand, and acts done by letter of attorney, regarding the latter as wholly void: 2 Inst. 483; *Finch Law*, 102. It has been held in New York and some other states, as well as in England, that a power of attorney given by an infant is void: *Fonda v. Van Horne*, 15 Wend. 631; *Knox v. Flack*, 22 Pa. St. 337; *Saunderson v. Marr*, 1 H. Black. 75. And if this supposed analogy were followed, the contracts in all the New York cases which we have cited would be void by the law of that state for want of a personal delivery by the defendant to the plaintiff. There may be still other explanations of the decisions.

In the present case it does not appear who delivered the note, and does not clearly appear that the defendant did not deliver it herself. The distinction as to powers of attorney has been limited, if not wholly done away with, in Massachusetts, in regard to infants: *Whitney v. Dutch*, 14 Mass. 457, 463; 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562; *Moley v. Brine*, 120 Mass. 324. But we express no opinion as to the effect of duress upon such powers, oral or written.

On the case as it is presented to us, we are of opinion that the ruling requested was wrong upon principle and authority. Exceptions overruled.

DURESS BY HUSBAND WILL NOT AVOID INSTRUMENT EXECUTED BY WIFE, if the other party thereto was ignorant thereof: See *Lefebvre v. Dutruit*, 37 Am. Rep. 833; and see *Wright v. Remington*, 32 Id. 180; *contra: Central Bank of Frederick v. Copeland*, 81 Am. Dec. 597.

MILLER v. SHAY.

[145 MASSACHUSETTS, 162.]

ACCOUNT-BOOK, KEPT BY ONE UNABLE TO WRITE, IN WHICH ONLY ENTRIES ARE STRAIGHT MARKS to indicate the number of loads of sand delivered, is admissible in evidence, when supported by oath; and at all events, such person has the right to use the book as a memorandum to refresh and aid his memory.

ACCOUNT-BOOK IS BOOK OF ORIGINAL ENTRIES, when the marks therein are transferred the same day from marks on a cart made by a servant who delivered the loads.

SERVANT IS COMPETENT AND NECESSARY WITNESS TO SUPPORT CHARGES AND PROVE DELIVERY, when goods are delivered by a servant, and his entries or marks are transferred to the master's account-book, which is offered in evidence.

CONTRACT for a number of loads of sand sold. The plaintiff testified that he could not write, and could read but little; that he delivered some of the sand himself, and employed his son William, Joseph Pratt, and Edward McCann, to draw and deliver other loads; that when he himself delivered any, he put a straight mark in a small account-book for each load; and that when Pratt or McCann worked, each of them marked on the side of his cart with chalk or pencil the number of loads he drew that day, and reported the same daily to the plaintiff, who made corresponding marks in his book, and the marks on the cart were then rubbed out. Pratt testified that he drew some of the sand in question, and kept an ac-

count of it by a chalk-mark on his cart for each load he drew; and against the defendant's objection and exception, testified that each day he drew sand he counted the marks for that day, and reported the number to the plaintiff. McCann gave similar testimony to that of Pratt. William Miller, the plaintiff's son, testified that he drew some of the sand, and kept an account himself, which was produced and identified. The plaintiff offered in evidence, against the defendant's objection, the book kept by him. It showed no debit or credit side, and did not mention the name of the defendant; but on different pages there were a series of straight marks, aggregating 214. The court held that the book was competent evidence, in connection with the evidence adduced by the plaintiff, if believed, and admitted it in evidence. The plaintiff had a verdict, and the defendant alleged exceptions.

G. T. Dewey, for the plaintiff.

W. A. Gile, for the defendant.

By Court, MORTON, C. J. The small account-book kept by the plaintiff, showing the number of loads of sand delivered, was properly admitted in evidence. It was a rough and imperfect book of accounts, but it was honestly kept, and was the record of the daily business of the plaintiff, made for the purpose of establishing a charge against another: *Pratt v. White*, 132 Mass. 477. Such a book, supported by the oath of the plaintiff, is competent, though the account was kept only by marks, the plaintiff being unable to write. These entries are intelligible, and no more liable to fabrication than other entries. It is a book of original entries, though the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the sand: *Smith v. Sanford*, 12 Pick. 139; 22 Am. Dec. 415; *Kent v. Garvin*, 1 Gray, 148; *Harwood v. Mulry*, 8 Id. 250.

Where goods are delivered by a servant, and his entries or marks are transferred to the master's account-book, it has been held that the servant must be a witness to support the charges and to prove the delivery: *Kent v. Garvin*, *supra*. In the case before us, therefore, the testimony of Joseph Pratt was competent and necessary.

If there was doubt whether the plaintiff's book ought to have gone to the jury, there is another ground upon which the defendant's exceptions should be overruled. In a transaction like that involved in this case, it is not to be expected that

any memory unaided could retain accurately the number of loads of sand delivered. The plaintiff had clearly the right to use his account-book as a memorandum to refresh and aid his memory. The fact that the book went to the jury could not prejudice the defendant. The only possible use the jury could make of it would be to count the marks, and see if the plaintiff had stated their number correctly. The exceptions show that the plaintiff's count was correct, and it is of no consequence to the defendant whether the jury took this number from the plaintiff's testimony or from a count of the marks. A new trial would not be granted because of the admission of incompetent testimony which is entirely immaterial.

Exceptions overruled.

ACCOUNT-BOOKS, WHAT ARE, SO AS TO BE ADMISSIBLE IN EVIDENCE: See *Union Bank v. Knapp*, 15 Am. Dec. 181, and note; *Boyd v. Ladson*, 17 Id. 707; *Rhodes v. Gaul*, 27 Id. 277; *Merrill v. Ithaca etc. R. R.*, 30 Id. 130; *Cummings v. Nichols*, 38 Id. 501; *White v. St. Phillip's Church*, 39 Id. 125; *Mathes v. Robinson*, 41 Id. 505; *Odell v. Culbert*, 42 Id. 317; *Doster v. Brown*, 71 Id. 153; *Reviere v. Powell*, 34 Am. Rep. 94; *Corr v. Sellers*, 45 Id. 370; *Ryan v. Dunphy*, 47 Id. 355; *Mayor etc. of New York v. Second Ave. R. R.*, 55 Id. 839; *Van Every v. Fitzgerald*, 59 Id. 835.

ACCOUNT-BOOKS CONTAINING TRANSCRIBED ENTRIES, WHEN BOOKS OF ORIGINAL ENTRIES: See *Pillsbury v. Locke*, 66 Am. Dec. 711, and note collecting prior cases; *State v. Shinborn*, 88 Id. 224; *Redlich v. Bauerlee*, 38 Am. Rep. 87.

WITNESS'S USE OF MEMORANDUM TO REFRESH HIS MEMORY: See *State v. Bacon*, 98 Am. Dec. 616, and note discussing the question; *Martin v. Good*, 74 Id. 545, and note; *Spring Garden M. Ins. Co. v. Evans*, 74 Id. 555, and note; *Acklen's Ez'r v. Hickman*, 35 Am. Rep. 54, and note; *Commonwealth v. Ford*, 39 Id. 426, and note; *State v. Collins*, 40 Id. 697; *Calloway v. Varner*, 54 Id. 78.

SPRING v. HAGER.

[146 MASSACHUSETTS, 186.]

GUEST'S FAILURE, UPON RETIRING, TO BOLT DOOR, AFTER HAVING LOCKED IT, IS NOT SUCH NEGLIGENCE ON his part as will defeat an action by him against the innkeeper, to recover the value of property stolen from the room during the night, if the existence of the bolt was not known to him, and his attention was not in any way called to it.

TORT against the keepers of a country inn to recover the value of a watch, chain, and a sum of money, stolen from the clothing of the plaintiff, while he was a guest at the inn. The verdict was for the defendants, and the plaintiff alleged exceptions. The facts are sufficiently stated in the opinion.

C. C. Conant and S. D. Conant, for the plaintiff

J. A. Aiken, for the defendants.

By Court, FIELD, J. The only negligence of the plaintiff which the defendants contended that the evidence proved was the neglect of the plaintiff to bolt the door. The plaintiff locked the door by a lock connected with the door-knob. The bolt was on the inside of the door, six inches from the top, and the door was "about six feet and six inches high." The plaintiff testified that "he did not know it was there until after the robbery." It does not appear that there were any regulations of the inn, which were posted in the room or anywhere else, or which were in any manner brought to the notice of the plaintiff, and it is conceded that the attention of the plaintiff "was not called by the defendants or by any one else to the bolt." The defendants contended, however, upon all the evidence, that "the plaintiff must have seen the bolt." The first request of the plaintiff for a ruling was, in effect, that his failure to bolt the door after having locked it was not such negligence as would defeat the action, even if he saw the bolt; and the second request was, in effect, that his failure to bolt the door after having locked it would not defeat the action, "if said bolt was not known to the plaintiff, nor his attention in any way called to the same." This second request raises the question whether it was the duty of the plaintiff to examine the door to see if there were other fastenings upon it besides the lock. It may be conceded that the bolt and lock together afforded greater security than either of them alone, and that, although the bolt was in an unusual place upon the door, it could easily have been seen if the plaintiff had searched for it.

The Public Statutes, chapter 102, section 16, provide that "an innholder against whom a claim is made for loss sustained by a guest may, in all cases, show that such loss is attributable to the negligence of the guest himself, or to his non-compliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the guest by the innholder." This provision was first enacted in the statute of 1853, chapter 405, section 3, which was soon after the decision in *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; and although this statute made some changes in the law, the clause that it is competent for an innkeeper to show that the

loss is attributable to the negligence of the guest is only declaratory of the common law: *Mason v. Thompson*, 9 Pick. 280; 20 Am. Dec. 471; *Berkshire Woollen Co. v. Proctor*, *supra*; *Elcox v. Hill*, 98 U. S. 218; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 Com. P. 515; *Cashill v. Wright*, 6 El. & B. 890; *Morgan v. Ravey*, 6 Hurl. & N. 265.

It has indeed been said that, "in the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law": *Murchison v. Sergeant*, 69 Ga. 206, 213. It has been often decided that not locking or fastening the door of a bedroom is not, as matter of law, negligence, but that this fact, in connection with others, may be evidence of negligence for the jury; and the weight of modern authority is, we think, that the failure to lock or bolt the door of a lodging-room at an inn, when there is a lock or bolt upon it, is evidence of negligence for the jury: *Oppenheim v. White Lion Hotel Co.*, *supra*; *Spice v. Bacon*, 36 L. T., N. S., 896; *Herbert v. Markwell*, 45 Id. 649.

At common law, "innkeepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God or the common enemy, or the neglect or fault of the owner of the property": *Mason v. Thompson*, 9 Pick. 284.

The statutes have not changed the general nature of the liability of an innholder; and subject to the statutory provisions, he is liable to his guests in cases where no actual negligence on the part of himself or his servants is shown. It has been held that the burden of proof is upon the innholder to show that the loss was caused by the negligence of his guest: *Norcross v. Norcross*, 53 Me. 163. The language of the Public Statutes, chapter 102, section 16, implies that this burden is upon the innholder. The case at bar is not, therefore, an action for negligence, and it may be doubted whether the rulings in such actions upon evidence of contributory negligence are in all respects applicable.

No case has been cited in which it has been held that the single fact that the plaintiff did not bolt his door, after having locked it on the inside, is sufficient evidence of negligence.

In *Spice v. Bacon*, and in *Herbert v. Markwell*, *supra*, the jury must have found that the door was left unfastened either by bolt or lock.

In *Morgan v. Rarey*, 2 Fost. & F. 283, it is said that the plaintiff locked the door, but did not bolt it. In the same case, in the court of exchequer, 6 Hurl. & N. 265, 266, it is said that "witnesses were, however, called on the part of the defendants to prove that the plaintiff had told them he had not locked the door." It was admitted that he did not use the bolt. There was a notice posted over the mantel-piece requesting "all visitors to use the night bolt," which the plaintiff admitted he saw, but said he did not read beyond the word "notice." Chief Baron Pollock, at *nisi prius*, left the question of negligence to the jury, but told "them at the same time that the guest was not bound to lock his bedroom door," etc. The verdict was for the plaintiff.

It must often depend much upon the circumstances of the case, the customs of the age and country, and the usages of the place, whether the plaintiff has been guilty of such negligence that the loss can be said to be attributable to it; and we cannot say, as matter of law, that, on the facts appearing in this case, if the plaintiff saw the bolt and did not use it, this was not some evidence of negligence to be submitted to the jury. The delivery of a key to a guest may be held to be an intimation to him that he is to use it in locking his door. The lock, however, is the only fastening which the guest can use when he is not in the room. A bolt, if seen, may itself suggest that it ought to be used. If, however, there are no regulations brought to the notice of a guest requesting him to bolt the door, and if it is not known to the guest that there is a bolt, and his attention is not in any way called to it, we are of opinion that the fact that, after locking his door with the key, he does not search for a bolt and find it, is not evidence of negligence on his part, and that the second ruling requested should have been given: See *Murchison v. Sergent*, *supra*; *Batterson v. Vogel*, 10 Mo. App. 235.

Exceptions sustained.

INNKEEPER IS GENERALLY CONSIDERED LIABLE AS INSURER OF GOODS OF GUEST: See note to *Read v. Amidon*, 98 Am. Dec. 562; *Houser v. Tully*, 1 Am. Rep. 390; *Ramaley v. Leland*, 3 Id. 728; *Wilkins v. Earle*, 2 Id. 635; *Adams v. Clem*, 5 Id. 524; *Cutler v. Bonney*, 18 Id. 127, and note; *Dunbier v. Day*, 41 Id. 772; but is relieved from responsibility by act of God, act of public enemies, or the negligence or fraud of the guest: *Read v. Amidon*, 98 Am. Dec. 560, and note collecting prior cases; *Dunbier v. Day*, 41 Am. Rep. 772, 775, and note; *Murchison v. Sergent*, 47 Id. 754; and see *Reubenstein v. Cruikshanks*, 52 Id. 806.

BATH v. METCALF.

[145 MASSACHUSETTS, 274.]

OFFICERS WHO MAKE WRONGFUL ARREST ARE ANSWERABLE JOINTLY, in an action for false imprisonment, with those who cause and take part in a subsequent detention under it; although, if the arrest had been lawful, they would not be liable for a subsequent wrongful imprisonment in which they took no part.

OFFICERS WHO CAUSE AND TAKE PART IN PROLONGING IMPRISONMENT OF ONE ARRESTED WITHOUT WARRANT, beyond the doors of the lock-up, for the purpose of sending him out of town, after the marshal has reason to believe him innocent, and has made up his mind to release him, are liable in an action for false imprisonment, even if the arrest had been lawful, and *a fortiori* if the arrest was unlawful.

VERDICT AGAINST ALL OFFICERS JOINTLY, IN ACTION FOR FALSE IMPRISONMENT, is proper, but only for the imprisonment between the lock-up and the railroad station, and on the ground that the arrest was wrongful, where a person was arrested, without a warrant, on a charge of felony, by two police officers of a city, and taken to the lock-up, and afterwards the city marshal, having reason to believe that the prisoner was innocent, and having made up his mind to release him, sent him, the assistant marshal taking part in such act, from the lock-up to the railroad station, in the custody of another officer

TORT for false imprisonment against seven defendants, Metcalf, Pettis, Wright, Hadd, Wheeler, Graves, and O'Malley. On May 25, 1886, the plaintiff and one Pierce, while waiting, about noon, in the railroad depot at Springfield, to take the train for Worcester, were arrested on suspicion of being pickpockets, by the defendants, Hadd and Wheeler, police officers, and by two detectives, and in spite of their protestations of innocence, and offers to prove their identity, were taken to the police station and locked up. The defendant Pettis, the city marshal, saw them soon afterwards and promised to investigate their case. Pettis returned about five o'clock in the afternoon, and said that he would send them on the next train to Worcester; but they were detained in the cell until nearly eight o'clock, when the defendant Wright, the assistant city marshal, unlocked the door, and turned them over to the defendant Graves and another policeman, who accompanied them to the railroad station, and saw that they were on the train. The defendant Metcalf was the mayor, and had consented to the hiring of the two detectives who assisted in the arrest. The defendant O'Malley was present when the arrest was made. It appeared that on the day of the arrest, and the day before, complaints had been made that pickpockets were at work at the railroad station; and that as the officers

who made the arrest were going along the side of the depot, Butler, one of the detectives, pointed to the plaintiff and Pierce, and said that they were pickpockets, whereupon the arrest was made. The jury found in favor of the defendants Metcalf and O'Malley, and against the rest. The defendants alleged exceptions.

F. W. Blackmer and E. H. Vaughan, for the plaintiff.

G. Wells, for the defendants.

By Court, HOLMES, J. This is an action for false imprisonment against seven defendants, five of whom the jury have found guilty. Of these five, the defendants Hadd and Wheeler made the original arrest, without a warrant, on a charge of felony. We cannot say that the evidence, if believed, showed that Hadd and Wheeler had reasonable grounds to suspect the plaintiff of being a pickpocket (supposing the justification to be well pleaded), whether the question was properly one for the jury, or was for the court, like other questions of reasonable cause: Compare *Rohan v. Sawin*, 5 Cush. 281; *Good v. French*, 115 Mass. 201; *Davis v. Russell*, 5 Bing. 354; *Hill v. Yates*, 8 Taunt. 182; *Mure v. Kaye*, 4 Taunt. 34; 2 Hawk. P. C., c. 12, sec. 18; 2 Inst. 52. If the original arrest was wrongful, those who made it were answerable for the subsequent detention of the plaintiff under it: *Murphy v. Countiss*, 1 Harr. (Del.) 143; *Powell v. Hodgetts*, 2 Car. & P. 432; and although the officers who carried the plaintiff in custody from the lock-up to the railroad station, after they had determined to release him, would have been liable, even if the previous imprisonment had been lawful, we do not think this continuation of the unlawful imprisonment so remote that the jury could not properly hold Hadd and Wheeler responsible for it: See also *Roswell v. Prior*, 12 Mod. 635, 640.

The defendant Pettis was city marshal, and whether responsible for the arrest and detention of the plaintiff in the lock-up or not, sent the plaintiff to the railroad station in custody, after he had reason to believe him innocent, and had made up his mind to release him. The defendant Wright, the assistant marshal, took part in sending the plaintiff to the station, and the defendant Graves was the officer who took him there, only releasing him when on the train, and just before it started.

As we have said, we think that, even if the arrest had been lawful, the officers would have had no right to prolong the imprisonment beyond the doors of the lock-up for the purpose of sending the plaintiff out of town, and would have been liable, whether they had a right to release him without bringing him before a magistrate or not: See *McCloughan v. Clayton*, Holt N. P. 478, 480; 1 Hale P. C. 592; *Brock v. Stimson*, 108 Mass. 520; 11 Am. Rep. 390; *Phillips v. Fadden*, 125 Mass. 198; *Caffrey v. Dragan*, 144 Id. 294. The only purpose for which an imprisonment without a warrant can be justified, in circumstances like the present, is, that further proceedings may be instituted in due form: *Rohan v. Sawin*, 5 Cush. 285; *Wright v. Court*, 6 Dowl. & R. 623, 624; 4 Barn. & C. 596. *A fortiori*, these officers are liable if the original arrest was unlawful, for then the whole detention under it was unlawful: *Aaron v. Alexander*, 3 Camp. 35; *Griffin v. Coleman*, 4 Hurl. & N. 265. It thus appears that the evidence warranted a verdict against each of the defendants named, and against all of them jointly; and that the instructions asked to the contrary were properly refused.

If the arrest had been made upon reasonable grounds of suspicion against the plaintiff, the defendants Hadd and Wheeler could not have been held liable for a subsequent wrongful imprisonment in which they took no part. On the other hand, Graves at least was not answerable for the imprisonment before the plaintiff was taken from the police station to the train, as he took no part in that: *Aaron v. Alexander* and *Powell v. Hodgetts*, *supra*.

It follows that a verdict could be found against the five defendants jointly only for the imprisonment between the lock-up and the train, and on the ground that the arrest was wrongful. We regret that it does not appear that these considerations were brought distinctly to the jury's attention. But we cannot say that they were not; the exceptions are only to the refusal of rulings which were properly refused; and as the jury were fully instructed that they could not find a verdict against two or more defendants unless they found that all such defendants participated in the same imprisonment and were parties to a joint wrong, we must assume that the verdict went on the proper ground, and covered the proper time.

Exceptions overruled.

PERSON INJURED BY JOINT TORT MAY SUE ALL OR ANY OF TORT-FEASORS: Note to *Kirkwood v. Muller*, 73 Am. Dec. 144; *Allred v. Bray*, 97 Id. 283; *McMannus v. Lee*, 97 Id. 386; *Bloss v. Plymale*, 100 Id. 752; but can have but one satisfaction: Note to *Kirkwood v. Miller*, 73 Id. 145; *Bennett v. Hood*, 79 Id. 705; *Stone v. Dickinson*, 81 Id. 727; *Ayer v. Ashmead*, 83 Id. 154; *Allred v. Bray*, *supra*; *McMannus v. Lee*, *supra*; *Bloss v. Plymale*, *supra*; *Lord v. Tiffany*, 50 Am. Rep. 689; except for costs: *Ayer v. Ashmead*, *supra*; *Lord v. Tiffany*, *supra*.

OFFICERS' LIABILITY FOR ARREST AND DETENTION WITHOUT WARRANT: See note to *Hanes v. State*, 44 Am. Dec. 202; note to *Mitchell v. State*, 54 Id. 268; *Brock v. Stimson*, 11 Am. Rep. 390.

MULCHAHEY v. WASHBURN CAR WHEEL CO.

[145 MASSACHUSETTS, 281.]

INSTANTANEOUS DEATH AND ABSENCE OF CONSCIOUS SUFFERING AFTER FATAL INJURY ARE DISTINCT, and therefore a ruling that there was no evidence of conscious suffering by the intestate, and consequently that the plaintiff was only entitled to recover nominal damages, is correct, and not inconsistent with a ruling that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative, where, in an action by an administratrix to recover damages sustained by the intestate in his lifetime by the breaking of a machine upon which he was employed by the defendant, it appeared that the intestate was found about ten minutes after the accident, with his body crushed and his bowels disrupted, and that, although breathing, he was unconscious, and died almost immediately in that state.

TORT by Kate Mulchahey, administratrix of Richard Mulchahey, to recover damages sustained by Mulchahey in his lifetime, by the breaking of a piston-rod of a steam-hammer, which he was engaged in operating for the defendant. The report of the presiding judge dealt only with the question of damages. The evidence tended to show that when the rod broke it was blown out, the whole shop was filled with escaping steam, and that all the workmen ran out, and returned when it was safe to do so. The deceased was found five or ten minutes after the accident, with his body crushed and his bowels disrupted, and although breathing, he was unconscious, and died in a few moments afterwards, without recovering consciousness. The court ruled that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative; that there was no evidence to warrant the jury in finding that the intestate endured any conscious pain or suffering; and that, upon the evidence, the plaintiff was only

entitled to recover nominal damages, if the defendant was liable. The defendant submitted to a verdict for nominal damages, the plaintiff excepting to the ruling. A verdict was accordingly returned for one dollar. It was agreed that if the ruling was correct, the verdict was to stand; but if not, a new trial was to be granted upon the whole case

W. S. B. Hopkins, for the plaintiff.

F. P. Goulding, for the defendant.

By Court, DEVENS, J. As the report of the presiding judge deals only with the question of damages, the evidence tending to make a case of negligence on the part of the defendant, and to show that an action therefor accrued to the intestate in his lifetime, is not stated. It is assumed by the report that it would be sufficient to sustain a verdict.

The plaintiff was justified in contending, upon the evidence, that the body of the deceased was not found until some ten minutes after the accident; that although then unconscious, he was still alive; and therefore that his death was not instantaneous. The ruling of the presiding judge was in accordance with this contention; but he further ruled that there was no evidence of conscious suffering by the intestate, and therefore that the plaintiff was entitled only to nominal damages. There was no evidence of any expenses or loss incurred before death by reason of the accident, which in itself might afford ground for substantial damages: *Bancroft v. Boston and Worcester R. R.*, 11 Allen, 34. The question is as to the correctness of the latter ruling.

The plaintiff deems these rulings inconsistent each with the other. We do not perceive the inconsistency. Instantaneous death and absence of conscious suffering after a fatal injury are readily distinguishable, and have been distinguished in our decisions. The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which it is determined whether a cause of action survives: *Hollenbeck v. Berkshire R. R.*, 9 Cush. 478. But as the plaintiff can only recover such damages as she can show were sustained by her intestate, if he became instantly insensible, and so remained until his death, nothing can be recovered for any physical or mental suffering sustained by him. Nothing can be recovered by the administratrix on account of the death which subsequently ensued: *Bancroft v. Boston and Worcester R. R.*, *supra*. In *Kennedy v. Standard Sugar Refinery*, 125

Mass. 90, 28 Am. Rep. 214, where the intestate fell from a platform twenty feet in height, became unconscious on striking the ground, and, in one aspect of the evidence, remained so until his death, the plaintiff was allowed at the trial, by the judge at *nisi prius*, to recover for mental suffering endured during his fall. It was held in this court that the burden of proof was upon the plaintiff to show that her intestate actually endured mental suffering during the fall, before she could recover damages on that account; that as no proof was furnished of any mental suffering during the fall, and as the question whether he did suffer mental terror or distress was purely a matter of conjecture, no damages could be recovered on that account. Whether the person injured endured conscious suffering has sometimes depended upon the question whether his death was instantaneous; but the two inquiries are distinct: *Corcoran v. Boston and Albany R. R.*, 133 Mass. 507; *Tully v. Fitchburg R. R.*, 134 Id. 499; *Riley v. Connecticut River R. R.*, 135 Id. 292.

That an adequate cause of the intestate's death, and one which must be held to have produced it, is found in the crushing of his body and disruption of his bowels, must be conceded. Viewed in the most favorable light for the plaintiff, this certainly fails to show any conscious pain or suffering on the part of the intestate. When found, although breathing, he was unconscious. Upon this state of facts, even if it were possible that there was some brief conscious suffering, evidence of it is not afforded, and it is left purely conjectural. The presiding judge did not undertake to say, as the plaintiff urges, that because ten minutes after the accident the victim of it could not speak and was unconscious, he might not have passed into that condition after brief but terrible suffering, but said, in substance, that the case did not afford evidence that he had suffered consciously. This was correct.

The plaintiff urges that the case at bar strongly resembles *Nourse v. Packard*, 138 Mass. 307; but the evidence here wanting was afforded in that case. The dead body of the intestate was there found under a heap of loose grain, and there was expert testimony that he died from suffocation, and that a person situated as he was would retain consciousness from three to five minutes. It was a reasonable conclusion that he lived in a state of conscious suffering for a few minutes after the fall of the grain upon him which caused his death.

Judgment on the verdict.

CAUSE OF ACTION SURVIVES IN SOME STATES, if person injured by negligence of another lives but a moment: Note to *Carey v. Berkshire R. R.*, 48 Am. Dec. 635, where the question is considered; *Kellow v. Central Iowa R'y*, 56 Am. Rep. 858; and damages for the mental suffering of the intestate may be recovered: Note to *Carey v. Berkshire R. R.*, 48 Am. Dec. 638; compare *Kennedy v. Standard Sugar Refinery*, 28 Am. Rep. 214.

WINN v. SANFORD.

[145 MASSACHUSETTS, 302.]

SURETY ON JOINT AND SEVERAL BOND EXECUTED TO HUSBAND BY WIFE AS PRINCIPAL OBLIGOR CANNOT SET UP INCAPACITY of the principal to contract with her husband as a defense to an action on the bond.

CONTRACT upon the following bond, executed by Susan B. Winn, as principal, and the defendant, Frederick C. Sanford, as surety: "Know all men by these presents, that we, Susan B. Winn, wife of John Winn, of Nantucket, as principal, and Frederick C. Sanford, of Nantucket, as surety, are holden and stand firmly bound unto John Winn, of Nantucket, above named, in the sum of three hundred dollars, to the payment of which to the said John Winn, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this obligation is such that, whereas, in a settlement of differences between said John Winn and Susan B. Winn, it was agreed by said Susan B. Winn, and on her behalf, that she should give to said John Winn a bond, with surety, 'to release dower whenever requested, and make no further claim on said John Winn for any support, or for any cause whatever.' Now, therefore, if said Susan B. Winn shall, whenever requested, sign release of dower in any real estate of said John Winn, and shall make no further claim upon him for any support, or for any cause whatever, then this obligation shall be void; otherwise it shall be and remain in full force and virtue." The court ruled, as a matter of law, that the bond could not be made the basis of any legal claim against the defendant; that Mrs. Winn not being liable to her husband under it, the defendant was not liable. The plaintiff alleged exceptions.

J. Brown, for the plaintiff.

L. L. Holmes, for the defendant.

By Court, DEVENS, J. It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by

that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case, he is in a certain sense an independent promisor, and must perform his promise.

In *Maggs v. Ames*, 4 Bing. 470, the defendant had guaranteed the purchases made by a married woman incapable of making a contract; the question in the case was whether this guaranty should have been in writing; but it is assumed throughout, by court and counsel, that if it had been in writing the defendant would have been liable, although there could have been no liability on the part of the principal.

In a similar manner, where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee: *Yale v. Wheelock*, 109 Mass. 502.

The bond in the case at bar is several as well as joint. It appears from it that Mrs. Winn is the wife of the obligee, and it recites the agreement made between them. This agreement made by her is void, so far as the case now discloses, solely because of her incapacity to contract; but this should not release the defendant from his engagement that she should perform the promise made by her. The defense which Mrs. Winn personally has, resulting from her situation, should not be open to him.

Nor do we perceive that any distinction can be made, as suggested by the defendant, between the promise of a married woman, which is void, and that of a minor, which is voidable. In either case, the surety assures the promisee against the incapacity of the principal to make a legal contract, whether it be more or less complete.

The cases in which it has been held that the coverture of *the principal* promisor at the time of making her promise will

not discharge the surety, when such coverture was known to him, are numerous, and have arisen on many descriptions of contract: *Smyley v. Head*, 2 Rich. Eq. 590; 45 Am. Dec. 750; *Kimball v. Newell*, 7 Hill, 116; *Nabb v. Koontz*, 17 Md. 283; *Jones v. Crosthwaite*, 17 Iowa, 393; *Weed Sewing Machine Co. v. Maxwell*, 63 Mo. 486; *St. Albans Bank v. Dillon*, 30 Vt. 122; 73 Am. Dec. 295; *Davis v. Statts*, 43 Ind. 103; 13 Am. Rep. 382; *Stillwell v. Bertrand*, 22 Ark. 375.

Exceptions sustained.

COVERTURE OF PRINCIPAL DEBTOR WILL NOT DISCHARGE SURETY: *Smyley v. Head*, 45 Am. Dec. 750; *St. Albans Bank v. Dillon*, 73 Id. 295, and note 298; *Allen v. Berryhill*, 1 Am. Rep. 312, per Dillon, C. J.; *Davis v. Statts*, 13 Id. 382; *Hicks v. Randolph*, 27 Id. 760.

WHEATON v. TRIMBLE.

[145 MASSACHUSETTS, 345.]

FINDING THAT HUSBAND ACTED AS DULY AUTHORIZED AGENT OF WIFE, in employing a person to perform labor upon the wife's house, is justified, in a proceeding to enforce a mechanic's lien therefor, by evidence that the husband had general management of the property, that he employed the petitioner to perform the labor, that the wife knew he was working upon the house, and that she personally gave him directions as to parts of the work.

PETITION to enforce a mechanic's lien. The court found for the petitioner, and the respondent alleged exceptions. The facts are stated in the opinion.

L. N. Francis, for the petitioner.

H. J. Fuller, for the respondent.

By Court, MORTON, C. J. The labor for which the petitioner seeks to enforce a lien was performed by him upon the house of the respondent. He was employed by the respondent's husband; and the presiding justice, who tried the case without a jury, has found that, in employing the petitioner, the husband acted as the duly authorized agent of the respondent. The only question before us is, whether there was evidence to justify this finding. There was evidence tending to show that the work was done upon her house, and was for her benefit; that she knew that the petitioner was working upon the house, and was present at different times, and personally gave him directions as to parts of the work; that she selected the papers

for the upper rooms, and the bills for them were afterwards paid by her husband. The husband and wife both testified that he was not her agent; but upon cross-examination, she testified that "her husband manages the property just as he used to when it was his; that she allows him to go ahead, and do just as he pleases with the whole property, and that ever since it has been in her name he has managed it just as he did before." It was for the court to determine what credit should be given to their testimony. Considering the relation which she bore to her husband and to the estate, that she knew the petitioner was working for her benefit, and took part in directing his work, and that she substantially testified that she had put the general management of the property in the hands of her husband, it is not an unreasonable inference that, in contracting with the petitioner, the husband was acting as her authorized agent. The evidence is quite as strong as it was in the case of *Arnold v. Spurr*, 130 Mass. 347, in which it was held that the question of agency should have been submitted to the jury.

Exceptions overruled.

MECHANIC'S LIEN CREATED ON WIFE'S ESTATE THROUGH HUSBAND'S AGENCY, POSSIBILITY OF: See note to *Loonie v. Hogan*, 61 Am. Dec. 693; *Knott v. Carpenter*, 75 Id. 779; *Tuttle v. Howe*, 100 Id. 205; *Lamer v. Bandon*, 23 Am. Rep. 571; *Flannery v. Rohrmayer*, 33 Id. 36; and see also *O'Neil v. Percival*, 51 Id. 634.

TOMLINSON v. BURY.

[145 MASSACHUSETTS, 343.]

LEGATEE WHOSE LEGACY IS SPECIFIC IS ENTITLED TO CONTRIBUTION FROM HOLDERS OF OTHER SPECIFIC LEGACIES, if his legacy is appropriated to satisfy the lawful claims of the testator's widow, who has waived the provisions of the will in her favor.

REQUEST OF "BANK STOCK" IS TO BE CONSTRUED AS DESCRIBING TESTATOR'S DEPOSITS IN VARIOUS SAVINGS BANKS, he having no shares of stock of any bank, nor any other property in banking associations.

LEGACY IS SPECIFIC, AND NOT GENERAL, when it is of "all the mill stock and bank stock remaining in my name after the decease of my said wife."

BILL in equity by certain legatees to obtain contribution from other legatees. A decree was ordered for the plaintiffs, and the defendants appealed. The facts are stated in the opinion.

J. M. Morton and A. J. Jennings, for the plaintiffs.

M. Reed, for the defendants.

By Court, DEVENS, J. The parties litigant have agreed, if the plaintiffs whose legacy has been appropriated to the claims of the widow are entitled to contribution from other legatees, as to the amount to which contribution shall be made, and also as to the proportions in which it shall be distributed. This leaves open as the only question for discussion, whether they are thus entitled. This depends apparently upon the inquiry whether the legacy to them is to be held as specific or general. The rule is well settled that, if a legacy is specific, and is appropriated to the payment of debts, the legatee (if the general or residuary legacies are not sufficient) is entitled to contribution from the holders of other specific legacies: *Farnum v. Bascom*, 122 Mass. 282. Nor is there any distinction between such a case and one where a specific legacy is appropriated to satisfy the lawful claims of the widow of the testator, who has waived the provisions of the will made in her favor. To the extent to which a specific legacy has been taken by the widow, the legatee would be entitled to contribution, as much as if it had been taken for the payment of debts. It is equally well settled that, if the claim for contribution of the plaintiffs rested upon the fact that they were residuary legatees, it could not be maintained. Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied: *Richardson v. Hall*, 124 Id. 228, 233.

The gift to the plaintiffs by the fourth clause of the testator's will was "all the mill stock and bank stock remaining in my name after the decease of my said wife." The plaintiffs were also residuary legatees and devisees under the sixth clause of the will, but they make, and could make, no claim on that account to any contribution. The words "bank stock" are to be construed as describing the testator's deposits in various savings banks. He had no shares of the capital stock of any bank, nor any other property in banking associations, and while the expression is not accurate, it must be held, under these circumstances, to describe these deposits. The question is not of importance in the case at bar, as, if there is a specific legacy of the "mill stock" which has been taken, the plaintiff would be entitled to contribution from the other legatees, and the amount has been agreed upon. Specific

legacies are held to contribute proportionally to the charges on the estate, unless from the expressions of the will, or from the position of the legatee, as where he receives a legacy in lieu of a debt or claim against the estate, it is seen that such legacy is entitled to a preference: *Farnum v. Bascom*, *supra*. There is a presumption of intended equality between general legatees as a class, and between specific legatees as a class. A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator, so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence, when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property, or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator. Tried by these tests, the legacy of the testator's "mill stock and bank stock" must be held specific. It could only be satisfied by this mill and bank stock, and if the testator had disposed of them, or of any part of them, to that extent the legacy would have been adeemed.

Nor, in considering whether the legacy is specific, is it important that it was of such of these stocks as remained after the decease of his wife. He had bequeathed to her "the use, improvement, and income of all" his estate, real and personal; he may have anticipated that it might suffer some diminution during her life, but whether he did so anticipate or not, the subject of the gift was distinctly defined.

The defendants contend that this case comes within a class of cases where it has been held that a gift of all a testator's personal estate, enumerating the various classes, has been held to be general, and not specific: *Hays v. Jackson*, 6 Mass. 149; *Howe v. Dartmouth*, 7 Ves. 137; *Brummel v. Prothero*, 3 Id. 111; *Walker's Estate*, 3 Rawle, 229; *Woodworth's Estate*, 31 Cal. 595. But the reason why it has been thus held is that in those cases no intent was shown to give a distinct part of the estate, nor to separate a portion thereof from the residue; but rather an intent to give the whole. A bequest is not the less specific because it includes numerous articles. A bequest of all the horses which the testator may own, of all his plate, of all the books in his library, or of all the horses, cattle, and farming tools on a particular farm or farms, is specific: *Stephenson v.*

Dowson, 3 Beav. 342; *Borden v. Jenks*, 140 Mass. 562; 54 Am. Rep. 507.

In the case at bar, the mill and bank stock were, by the bequest, separated and distinguished from the testator's other personal property.

Decree affirmed.

LEGACY WHEN SPECIFIC, AS DISTINGUISHED FROM GENERAL: See *Chase v. Lockerman*, 36 Am. Dec. 277; *Ross's Ex'r v. Carpenter*, 50 Id. 513; and see note to *Hansbrough's Ex'rs v. Hooe*, 37 Id. 667; *Borden v. Jenks*, 54 Am. Rep. 507.

FREEMAN v. FOSS.

[145 MASSACHUSETTS, 361.]

STATUTE OF FRAUDS CANNOT BE SET UP TO DEFEAT ACTION UPON QUANTUM

MERUIT for services rendered by the plaintiff's minor son under an express verbal contract, by which it was agreed that the son should work in the defendant's office for two years, and receive instruction in dentistry, and at the end of that time have his tuition fees paid in a dental college, but before the expiration of that time the son became unwilling to remain longer under the contract, and asked that a certain sum be paid him for his services thereafter, which was done.

CONTRACT for services rendered by the plaintiff's minor son from March 31, 1884, to March 18, 1885, and from October 5, 1885, to January 4, 1886. The defendant pleaded a general denial, and set up an express contract, which he alleged had been performed. The plaintiff contended that this express contract was within the statute of frauds, and could not be used in evidence to defeat the action. It appeared that the plaintiff and defendant verbally agreed that the boy should go to work for two years in the defendant's office, and receive instruction in dentistry, and at the end of that time the defendant should pay the boy's tuition in the Boston Dental College. The boy went to work in the defendant's office on March 31, 1884, and remained there until March 18, 1885, when, by reason of illness, he left, and remained away until October 5, 1885. He returned on that day, and remained until January 4, 1886, when he expressed an unwillingness and inability to remain longer under the contract, and requested that he should be paid three dollars a week for his services thereafter. This was verbally agreed to, and he continued for some weeks, receiving three dollars per week. The court admitted the evidence, but ruled that the plaintiff could maintain the action.

upon a *quantum meruit*, notwithstanding the contract, and that by reason of the statute of frauds, the defendant could not set up the contract in defense of the action. The defendant excepted, and asked the court to rule that the contract was executed on both sides up to the time of the new agreement, January 4, 1886, and that an action upon *quantum meruit* could not be maintained, when the plaintiff had received from the defendant, on January 4, 1886, all the considerations due and payable at the time under the original contract for services theretofore performed. The court refused so to rule, and found for the plaintiff. The defendant alleged exceptions.

C. P. Weston, for the plaintiff.

C. W. Bartlett, for the defendant.

By Court, KNOWLTON, J. The defendant seeks to avoid liability for services of the plaintiff's son, by showing that they were rendered under an express contract, and that he did all that he agreed to do so long as the boy remained in his service. The contract which he sets up was within the statute of frauds; it was entire and indivisible, and was not fully performed by either party. A large part of the consideration for the plaintiff's agreement was not payable by the defendant until after the end of the term of service, and no part of it was applicable to any particular portion of the term. As the plaintiff could not have enforced this contract against the defendant, so the defendant cannot avail himself of it to avoid liability upon a *quantum meruit*. This case cannot be distinguished from *King v. Welcome*, 5 Gray, 41. See also *Bernier v. Cabot Mfg. Co.*, 71 Me. 506; 36 Am. Rep. 343; *Comes v. Lamson*, 16 Conn. 246.

Exceptions overruled.

RECOVERY FOR SERVICES RENDERED, WHEN SPECIAL CONTRACT IS NOT COMPLETED: See *Patnote v. Sanders*, 98 Am. Dec. 564, and note collecting prior cases; *Massey v. Taylor*, 98 Id. 429; *Derocher v. Continental Mills*, 4 Am. Rep. 286; *Galvin v. Prentice*, 6 Id. 58; *Howard v. Daly*, 19 Id. 285, 289; *Jennings v. Lyons*, 20 Id. 57; *Leopold v. Salkey*, 31 Id. 93, and note; *Steeple v. Newton*, 33 Id. 705; *McMillan v. Malloy*, 35 Id. 471; *Fildew v. Besley*, 36 Id. 433, and note; *Bast v. Byrne*, 37 Id. 841; *Dewey v. Alpena School District*, 38 Id. 206, and note; *Purcell v. McComber*, 38 Id. 366; 35 Id. 476, note; *Cook v. McCabe*, 40 Id. 765; *Richards v. Eagle Machine Works*, 41 Id. 584; *Diefenback v. Stark*, 43 Id. 719; *Weis v. Devlin*, 60 Id. 38.

CONTRACT NOT TO BE PERFORMED WITHIN YEAR, WHEN WITHIN STATUTE OF FRAUDS: See *Doyle v. Dixon*, 93 Am. Dec. 80, and note discussing the question; *Lawrence v. Cooke*, 96 Id. 443; *Pitkin v. Noyes*, 97 Id. 615; *Sheehy*

v. Adarene, 98 Id. 623; *Gault v. Brown*, 2 Am. Rep. 210; *Jilson v. Gilbert*, 7 Id. 100; *Argus Co. v. Mayor of Albany*, 14 Id. 296; *Fall v. Hazelrigg*, 15 Id. 278; *Kent v. Kent*, 20 Id. 502; *Dickson v. Frisbee*, 23 Id. 565; *Towsley v. Moore*, 27 Id. 434; *Parks v. Francis's Adm'r*, 28 Id. 517; *Smalley v. Greene*, 35 Id. 267; *Bernier v. Cabot Mfg. Co.*, 36 Id. 343; *Sutcliffe v. Atlantic Mills*, 43 Id. 39; *Groves v. Cook*, 45 Id. 462; *McGinnis v. Cook*, 52 Id. 115; *Meyer v. Roberts*, 55 Id. 567; *Osment v. McElrath*, 58 Id. 17; *Washburn v. Dosch*, 60 Id. 873.

COWEN v. SUNDERLAND.

[145 MASSACHUSETTS, 362.]

LESSEE TAKES RISK OF QUALITY OF PREMISES HIRED, in the absence of an express or implied warranty, or of deceit, on the part of the lessor, and cannot ordinarily maintain an action against the lessor for injuries sustained by reason of their defective condition; but the lessor is liable if the lessee is injured through concealed and dangerous defects, known to the lessor, and which a careful examination of the premises by the lessee would not discover.

EVIDENCE SHOULD BE SUBMITTED TO JURY, TO DETERMINE WHETHER LANDLORD KNEW OF DEFECTIVE COVERING OF CESSPOOL, and the danger resulting therefrom, and neglected to inform the tenant thereof, and whether the tenant had failed to make a proper examination of the premises, in an action by a tenant against her landlord for injuries sustained by her from falling into a cesspool in the yard of the premises, where it appeared that the cesspool was never pointed out to the tenant, and that she did not know of its existence, that it was covered by rotten boards, concealed by earth, upon which grass and weeds were growing, and that the landlord had directed the cover to be repaired with old boards some time before, and was present when the repairs were made.

TORT for personal injuries sustained by the plaintiff from falling into a cesspool upon premises owned by the defendant, and occupied by the plaintiff as a tenant at will. The court ruled that there was no evidence to authorize a verdict for the plaintiff, and directed a verdict for the defendant. The evidence is set forth in the opinion. It was agreed that if the ruling was erroneous, the verdict should be set aside; but otherwise judgment was to be entered on the verdict.

J. E. Cotter and C. F. Jenney, for the plaintiff.

C. P. Gorely and A. L. Bartlett, for the defendant.

By Court, DEVENS, J. It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. If, therefore, he is injured by reason

of the unsafe condition of the premises hired, he cannot ordinarily maintain an action, in the absence of such warranty or of misrepresentation. The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe, and adapted to the purposes for which they are hired.

There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not spring directly from the contract, but from the relation of the parties, and is imposed by law. When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor, if injury occurs. The principle that one who delivers an article which he knows to be dangerous to another ignorant of its qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result, and which does result, has been applied to the letting of tenements. It has thus been held that where one let premises infected with the small-pox, and injury occurred thereby, he was liable, if, knowing this danger, he omitted to inform the lessee: *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122. This case proceeded upon the ground of the lessor's negligent failure to perform a duty which he owed the lessee; and it was not deemed important whether the omission to give the information was intentional or otherwise: See also *Bowe v. Hunking*, 135 Mass. 380; 46 Am. Rep. 471, and cases cited; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169.

Obviously, there may be many concealed defects and dangers about a house which careful examination will not discover. If these are known to the lessor, it is for him to reveal them. Traps or contrivances may exist, by means of which the most careful occupant might be injured. "Such traps or contrivances," says Mr. Justice Field, "are not merely a want of repair; they are, in a sense, active agencies of mischief, which no tenant would expect to find in even a decayed and ruinous tenement": *Bowe v. Hunking*, *supra*.

In *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217, the defect alleged was in the manner of hanging a chandelier. The chandelier was hung unsafely, and the lessor knew it, and did

not disclose this fact to the lessee. It was not apparent to an observer. It was held that the lessor was liable to a servant of the lessee who was injured by its fall: See also *Scott v. Simons*, 54 N. H. 426; *Godley v. Hagerty*, 20 Pa. St. 387; 59 Am. Dec. 731.

In *Bowe v. Hunking*, *supra*, it was held that the case then at bar was not within the exception to the general rule, by which a lessor is rendered liable for negligence of this character. There was no evidence that the defective step by which the injury in that case occurred was known to the lessor, or her agent, to be unsafe; and further, this defect itself was obvious, and whatever danger existed was readily seen by examination.

In the case at bar, as the plaintiff presented it, there was evidence that she did not know of the existence or location of the cesspool; that it was in the yard she had hired and was entitled to use; that it was covered with from four to six inches of earth, on which grass and weeds were growing; that it presented the same appearance as the rest of the yard; that it had never been pointed out to her; that it was where she passed over it in her use of the yard; that the boards which covered it, and on which the earth rested, were rotten and decayed; and that, in stepping upon this covering of the cesspool, she sank into it, and was injured. There was further evidence that this cover had been repaired with old boards some time before, by the defendant's direction, and that the defendant was present when this was done. From the testimony of the witnesses of these repairs, the jury might fairly have inferred that it was left in an unsafe state, and known to be so.

Upon these facts, the learned judge erred in withdrawing the case from the jury. It should have been submitted, with proper instructions, to determine whether the defendant knew the defective covering of the cesspool, and the danger therefrom, and had negligently omitted to inform the plaintiff, and whether the plaintiff herself, making careful examination, had been injured thereby by reason of a want of proper information.

Verdict set aside.

LANDLORD'S LIABILITY TO TENANT FOR DEFECTIVE CONDITION OR CONSTRUCTION OF PREMISES: See note to *Polack v. Pioche*, 95 Am. Dec. 118; *Doupe v. Genin*, 6 Am. Rep. 47; *Gill v. Middleton*, 7 Id. 548; *Marshall v. Cohen*, 9 Id. 170; *Jaffe v. Harteau*, 15 Id. 438; *Minor v. Sharon*, 17 Id. 122.

and note; *Cesar v. Karnitz*, 19 Id. 164; *Glickauf v. Maurer*, 20 Id. 238; *Toole v. Beckett*, 24 Id. 54; *McAlpin v. Powell*, 26 Id. 555; *Looney v. McLean*, 37 Id. 295; *Jones v. Freidenburg*, 42 Id. 86, and note; *Krueger v. Ferrant*, 43 Id. 223; *McCarthy v. York County Savings Bank*, 43 Id. 591; *Purcell v. English*, 44 Id. 255; *Coke v. Gulkese*, 44 Id. 499; *Woods v. Naumkeag Steam Cotton Co.*, 45 Id. 344; *Bowes v. Hunking*, 46 Id. 471, and note; *Pike v. Brittan*, 60 Id. 527; *Donaldson v. Wilson*, *post*, p. 487.

GIROUX v. STEDMAN.

[145 MASSACHUSETTS, 439.]

WARRANTY THAT HOGS ARE FIT FOR FOOD IS NOT IMPLIED, where farmers who are not dealers in provisions kill hogs and sell them, knowing that the purchasers intend them for domestic use.

ACTIONS of tort, brought by Richard Giroux, Mary Giroux, Joseph Pecord, and Mary Giroux, against Phineas Stedman and another. The declarations alleged that the defendants sold the plaintiffs certain meat for domestic use, which was unwholesome, corrupted, and unfit to be used as food, of which the defendants well knew, but of which they negligently and wrongfully failed and neglected to give the plaintiffs notice or information, and that the plaintiffs ate the meat and were made sick thereby. It appeared that the defendants were farmers, jointly interested in raising hogs. About the middle of September, 1885, the defendants found that an infectious disease, known as the hog cholera, existed upon their farm, and that their entire herd had been exposed to the disease. On October 3d and October 5th following, they killed some of the hogs, dressed them, and sold them to the plaintiffs. They knew that the meat was for the plaintiffs' domestic use, but they made no representations as to the quality, nor did they give any notice to the plaintiffs of the existence of the disease among their herd. There was evidence tending to show that, although the defendants' whole herd had been exposed to the disease, a portion of it only had been affected; and that even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease. The court instructed the jury as appears in the opinion. The jury returned a verdict for the defendants, and the plaintiffs alleged exceptions.

W. W. McClench, for the plaintiffs.

E. W. Chapin, for the defendants.

By Court, DEVENS, J. It was known to the defendants that the plaintiffs purchased the meat to be used as provisions, but it was held by the presiding judge that, in order that they should recover, they must prove the allegations in their declarations, that the defendants knew that the meat sold by them was unwholesome, and improper to be used as provisions. He instructed the jury that, at common law, the general rule is, that where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in, or has a right to sell, the chattel. He added that there is an exception to this general rule where a provision dealer or market-man sells provisions, as meat and vegetables, to his customers for use, and that in such case there would be an implied warranty that they were fit for use and wholesome.

Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that the defendants were brought within it. The contention of the plaintiffs is, that even if the rule is well established that, where there is no express warranty and no fraud, no warranty of the quality of the thing sold is implied by law, and that the maxim of *caveat emptor* applies, there is a more general exception which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made.

That in a sale of an animal by one dealer to another, even with the knowledge that the latter dealer intends to convert it into meat for domestic use, or that in the sale of provisions in the course of commercial transactions there is no implied warranty of the quality, appears to be well settled: *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608, and cases cited; *Burnby v. Bollett*, 16 Mees. & W. 644. While occasional expressions may be found, as in *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339, which sustain the plaintiffs' contention, we have found but one decided case which supports it. In *Van Bracklin v. Fonda*, *supra*, it is said that in a sale of provisions the vendor is bound to know that they are sound, at his peril, but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved.

The case of *Hoover v. Peters*, 18 Mich. 51, does sustain the plaintiffs' contention, as it is there held that, where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or by any other person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business than he should be called on to bear. The opinion is not supported by any citation of authorities. In a dissenting opinion by Mr. Justice Christiancy, it is said: "Had it appeared that he [the defendant] was the keeper of a meat-market or butcher's shop, and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brethren have expressed." If there is an exception to the rule of *caveat emptor* which grows out of the circumstances of the case and the relations of buyer and seller, where the latter is a general dealer and the former a purchaser for immediate use, there appears no reason why it should be further extended.

In the case at bar, the defendants were not common dealers in provisions, or market-men. They were farmers selling a portion of the produce of their farms. No representations of the quality of the meat sold was made by them. In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for the purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser.

The plaintiffs contend that the case of *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, is decisive in their favor, but it appears to us otherwise. In that case the defendant sold hay, which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effects of eating the hay the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive; his belief that he had remedied the difficulty was conjectural and uncertain, and proved to be wholly erroneous.

In the case at bar, while the defendant's herd had been

exposed to hog cholera, there was evidence that a portion of it only had been affected, and further, that even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease; and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome.

In *French v. Vining*, *supra*, the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued because it had been unsuccessful, if he sold the hay without informing the purchaser of the dangerous injury which it had received.

Exceptions overruled.

WARRANTY THAT ARTICLE IS FIT FOR FOOD IS IMPLIED in sales by dealers and common traders for direct consumption: Note to *Hunter v. State*, 73 Am. Dec. 167, where the question is considered; *Sinclair v. Hathaway*, 58 Am. Rep. 327; and see *Jones v. George*, 42 Id. 689; but upon the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate use: *Howard v. Emerson*, 14 Id. 608.

HALE v. SPAULDING.

[145 MASSACHUSETTS, 482.]

RECEIPT UNDER SEAL, GIVEN BY OBLIGEE TO JOINT OBLIGOR "in full satisfaction for his liability" upon the obligation, releases the co-obligors, if the receipt itself does not show a contrary intention.

CONTRACT by William Hale against L. V. Spaulding, H. M. Chase, A. H. Saltmarsh, Richard Webster, George A. Hall, and Cyrus D. Furbur, upon a sealed instrument, by which the defendants agreed to pay to the plaintiff, on demand, six sevenths of all loss to which he might be subjected as indorser of a certain note. Saltmarsh alone defended, and set up that since the execution of the contract the plaintiff had executed and delivered to the defendant Spaulding the following instrument under seal: "Received of L. V. Spaulding \$1,060.84 in full satisfaction for his liability on the document signed by L. V. Spaulding, H. M. Chase, A. H. Saltmarsh, Richard

Webster, George A. Hall, William Hale, and Cyrus D. Furbur, dated May 23, 1885." The plaintiff offered to show that in giving the receipt there was no intention of releasing Saltmarsh, but the court ruled that the offer was not material, and that the receipt released Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. H. Moody, for the plaintiff.

H. N. Merrill, for the defendant.

By Court, C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule that a release to one joint obligor releases all: *Wiggin v. Tudor*, 23 Pick. 434, 444; *Goodnow v. Smith*, 18 Id. 414; 29 Am. Dec. 600; *Pond v. Williams*, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention: 1 Lindley on Partnership, 433; 2 Chitty on Contracts, 11th Am. ed., 1154 et seq.; *Ex parte Good*, L. R. 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue: See *Kenworthy v. Sawyer*, 125 Mass. 28; *Willis v. De Castro*, 4 Com. B., N. S., 216; *North v. Wakefield*, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent: *Tuckerman v. Newhall*, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

RELEASE OF ONE JOINT DEBTOR RELEASES ALL, unless the instrument shows a contrary intention: *Yates v. Donaldson*, 61 Am. Dec. 283, and note collecting other cases; but a covenant not to sue one of several joint debtors does not discharge the debt as to the others: *Brown v. White*, 80 Id. 226.

WILSON v. WILSON.

[145 MASSACHUSETTS, 490.]

TRUSTEE, WHO IS BENEFICIARY'S SON, MAY BE REMOVED, on application of beneficiary, because a state of mutual hostility has arisen between them since the creation of the trust, attributable in part to the fault of the trustee, and which would naturally pervert the feelings and judgment of the trustee, who is given full power to determine what allowance the beneficiary shall have, limited only by the duty of exercising a fair and reasonable discretion, although there is no distinct proof of misconduct in consequence of such hostility.

APPEAL from a decree of the probate court removing James H. Wilson, one of the trustees under the will of Deborah Wilson, upon the petition of Job T. Wilson, a beneficiary. The case was reserved for the consideration of the whole court. The facts are stated in the opinion.

J. M. Wood, for the petitioner.

J. M. Morton, for the respondent.

By Court, **MORTON, C. J.** The will of the testatrix, who was the wife of the petitioner, gives the most of her estate to the respondent and two others, upon the trust that they "may, in the exercise of their discretion, pay" to the petitioner such portion of the income, "or no portion at all thereof, as they shall from time to time think fitting and proper," shall invest the surplus income for accumulation, and at the death of the petitioner shall convey one half of the trust estate to her daughter or her issue, or if she leaves no issue, to the issue of the respondent, and shall hold the other half in trust until the death of the respondent, when it shall be conveyed to his issue. It also provides in the last clause that "if either of the recipients under this will, husband, children, or grandchildren, or children's issue, shall be wanting in thrift," the trustees are ordered and charged with making the conveyances and payments before provided in such way and to such persons as shall be most likely to inure to the benefit of the recipients, "exercising in all such case and cases the judgment that would be expected from a good father to each of such recipients respectively."

The will contemplates that a part of the income is to be applied to the benefit of the petitioner, unless some cause exists to the contrary. Although the discretion given to the trustees is very broad, yet they are to act upon their discretion and judgment, not upon their mere will or caprice, or from selfish

or improper motives; they are to exercise the judgment to be expected from a good father.

The petitioner has a right to demand of them that, in determining how much of the income should be paid to him or for his benefit, they should exercise a fair and reasonable discretion and judgment; and if they unfairly or corruptly refuse to do this, he is a party "beneficially interested in the trust," who, under the statute, may apply for the removal of the trustees: Pub. Stats., c. 141, sec. 9.

We come, then, to the merits of the case.

The statute provides that the supreme judicial court and the probate courts may, "upon application of the parties beneficially interested in the trust, remove a trustee under a written instrument, if such removal appears essential to the interests of the applicants": Pub. Stats., c. 141, sec. 9. This gives a broad power to the court, and leaves the question of the removal of a trustee very largely to its discretion.

In this case, the justice who heard the case upon appeal from the probate court has not reported the evidence; we cannot therefore revise his findings. He has found, as the result of the hearing, that the respondent is the dominant member of the board of trustees appointed by the will, that there exists a strong mutual hostility between the respondent and the petitioner, who is his father, that he cannot satisfactorily apportion the blame for the existing quarrel, and that he does not find any misconduct of the trustee distinctly attributable to hostility. But he finds that "in view of the absolute discretion reposed in the trustees as to the allowance to the petitioner, and the whole state of affairs disclosed by the evidence, the trustee ought to be removed, if the petitioner has a *locus standi*, and unless mutual hostility not attributable solely to the trustee, without distinct proof of misconduct in consequence of it, is never a sufficient ground of removal in a case like the present." This is equivalent to a finding by the justice that the respondent ought to be removed, unless, upon the facts in the case, the justice had no right in law to remove him.

We think it was within the province of the presiding justice to decide whether, upon all the evidence, the trustee should be removed. The relation between the father and the son created by the will is one of extreme delicacy. The trustees have full power to determine what allowance the father shall have, limited only by the duty of exercising a fair and reasonable discretion. Every one instinctively feels that a state of *mutual hostility* between the trustee and such a beneficiary,

arising after the trust was created, caused in part by the fault of the trustee, unfits him, to a greater or less degree, for the fair execution of the trust. But from the nature of the case, it would be very difficult, if not impossible, to find distinct proof that, in exercising his discretion, the trustee was actuated or influenced by such hostility. And yet it may be apparent that according to the laws which generally govern human action, he could not be relied upon to act fairly towards the beneficiary. We think that, in a case like this, where the duty of a trustee is so delicate, where the hostility has arisen since the trust was created, and is attributable in part to the fault of the trustee, where the existence of the hostility would naturally pervert his feelings and judgment, it is competent for a justice to remove a trustee without further proof of misconduct, upon the ground that the removal appears essential to the interests of the beneficiary.

In *McPherson v. Cox*, 96 U. S. 404, 419, Mr. Justice Miller states that "where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into constant personal intercourse with the latter, it may be conceded that the mere existence of strong mutual ill feeling between the parties will, under some circumstances, justify a change by the court." In *Scott v. Rand*, 118 Mass. 215, it is said in the opinion that the question of removing a trustee depends upon "a careful consideration of all the circumstances, the existing relations, and to some extent the state of feeling between the parties. It is addressed to the reasonable discretion of the court." And the trustee was removed, although he had acted from honest motives, mainly upon the ground that, in a quarrel between the *cestui que trust* and her husband, he had taken the part of the husband, and thus created unfriendly relations with her.

The respondent relies upon the cases of *Forster v. Davies*, 4 De Gex. F. & J. 133, and *Nickels v. Philips*, 18 Fla. 732. But they are quite different from the case at bar. It does not appear in those cases that any blame attached to the trustees for the existing feud or hostility; and the trustees had no discretionary power over the rights of the *cestui que trust*, so that the existence of hostility was of minor importance, as it could not affect the due execution of the trust.

Decree of probate court affirmed.

SIMPSON v. STORY.

[145 MASSACHUSETTS, 497.]

LIABILITY OF OWNERS OF FISHING VESSELS IS NOT CONTROLLED AND LIMITED by the provisions of the United States Statutes of 1884, chapter 121, section 18, which enacts that "the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole."

CONTRACT by Joseph Simpson against Arthur D. Story and Eli Wilson to recover for repairs done and supplies furnished the fishing schooner A. M. Burnham, owned by the defendants in equal parts. Story, who alone defended, claimed that if he was liable at all, he was liable for but half of the debt, under the United States Statutes of June 26, 1884, chapter 121, section 18, which provides: "The individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole"; and requested the court to so instruct the jury. The court refused to give such instruction, but charged that if Story authorized or ratified the purchase in question, he was liable for the full amount of the plaintiff's bill. The plaintiff had a verdict accordingly, and the defendant alleged exceptions.

W. A. Pew, Jr., for the plaintiff.

C. A. Russell, for the defendant.

By Court, C. ALLEN, J. In construing an act of Congress, the title of the act, the objects to be accomplished, the other provisions found in connection with those under especial consideration, the provisions and arrangement of the statutes which were amended, the mode in which the embarrassing words were introduced as shown by the journals and records, the history of the times, and especially of prior legislation upon the same general subject, may all be considered: *Myer v. Car Co.*, 102 U. S. 1, 11; *United States v. Union Pacific R. R.*, 91 Id. 72, 79, 82; *Hadden v. The Collector*, 5 Wall. 107, 110; *Blake v. National Banks*, 23 Id. 307, 319; see also *Field v. Gooding*, 106 Mass. 310, 313; *Commonwealth v. Bank of Mutual Redemption*, 4 Allen, 1, 13; *Holbrook v. Holbrook*, 1 Pick. 248. Looking at the statute now under consideration (United States Statutes of June 26, 1884, c. 121, sec. 18) in this manner, it appears that it was not the design of Congress to include fishing vessels within its provisions. Its title is, "An act to remove certain burdens on the American merchant marine,

and encourage the American foreign carrying trade, and for other purposes." The object of the prior legislation which was amended, as well as of the act in question, was to promote the building of ships, and to encourage persons engaged in the business of navigation, with special reference to the foreign carrying trade; so that American vessels might enter into this trade in competition with foreign vessels, and on more nearly the same terms: See *Moore v. American Transportation Co.*, 24 How. 1; *Walker v. Transportation Co.*, 3 Wall. 150. This is shown by the whole history of the legislation, and by the course of the discussions in Congress: See Congressional Record, 48th Congress.

American vessels were subject to burdens which foreign vessels were free from; and all the other sections of the statute had reference to the removal of such burdens. Section 18 was not in the original bill introduced in the House of Representatives, but it is found in substance in a bill introduced in the Senate, which proceeded concurrently with that in the House; and it was retained in the report of a joint committee of conference. Prior statutes had established an exemption or limitation of responsibility for losses by fire, embezzlement, and otherwise, but they did not include any exemption in respect to debts; and similar limitations existed in foreign countries: U. S. Stats. 1851, c. 43, secs. 1-4; U. S. R. S., secs. 4282-4284; *The Scotland*, 105 U. S. 24; *Norwich Co. v. Wright*, 13 Wall. 104; *The Rebecca*, 1 Ware, 188. A similar statute had long existed in Massachusetts: Stats. 1818, c. 122; R. S., c. 32, secs. 1-4. Except as thus limited, the responsibility of joint owners of vessels was joint, while the *delectus personarum* of a partnership did not exist, since one joint owner could transfer his share in the vessel without the consent of the others. A vessel engaged in foreign trade is liable to be away from home for long periods of time, under the control of agents. Section 18 sought to place the owners of such vessels more nearly on the footing of stockholders in a corporation, in order that men of wealth might be encouraged to invest in ships. Congress was not, however, at this time dealing with fishing vessels, but with vessels engaged in foreign commerce. The merchant shipping is treated as a subject distinct from the fisheries in legislation, in decisions of the courts, and in text-books: U. S. R. S., tit. 48-53; *Wait v. Gibbs*, 4 Pick. 298; *The Swallow*, 1 Ware, 21; *Taber v. United States*, 1 Story, 1, 6, 7; *The Three Brothers*, 1 Gall. 142; Abbott on Shipping,

605, 606. Section 18 appears to have been intended to relate to the same common object with the rest of the statute, and does not extend the limitation of responsibility to owners of fishing vessels; and the common-law liability of such owners remains.

Since the decision of this case, the attention of the court has been called to the United States Statutes of June 19, 1886, chapter 421, section 4, extending the provisions of the United States of 1884, chapter 121, section 18, to all sea-going vessels. While this does not affect the liability of the defendant in the present case, it confirms the construction put by the court upon the Statutes of 1884, chapter 121, section 18.

Exceptions overruled.

EACH PART-OWNER OF VESSEL IS LIABLE IN SOLIDO FOR REPAIRS AND SUPPLIES: *Elder v. Larrabee*, 71 Am. Dec. 567, and note; note to *Donnell v. Walsh*, 88 Id. 368, where the question is considered.

McPHEE v. LITCHFIELD.

[145 MASSACHUSETTS, 565.]

CERTIFICATE FILED UNDER MECHANIC'S LIEN LAW, which requires the name of the owner or owners of the property, if known, to be stated, is good, if the petitioner, not knowing the name of the owner, sets forth that the land is owned, to the best of his knowledge and belief, by a certain named person.

PETITION against Frederick W. Litchfield, Catherine Broderick, and Margaret McNamara, to enforce a mechanic's lien for labor performed in erecting a house. The facts are sufficiently stated in the opinion.

T. J. Morrison, for the petitioner.

J. A. Maxwell, for the respondents.

By Court, MORTON, C. J. The only objection made by respondents to the validity of the petitioner's lien is that the certificate filed by him in the registry of deeds was insufficient. The statute provides that "the lien shall be dissolved unless the person desiring to avail himself thereof, within thirty days after he ceases to labor on or to furnish labor or materials for the building or structure, files in the registry of deeds for the county or district in which the same is situated, a statement of a just and true account of the amount due

him, with all just credits given; a description of the property intended to be covered by the lien, sufficiently accurate for identification; and the name of the owner or owners of such property, if known": Pub. Stats., c. 191, sec. 6.

In the case before us, the petitioner duly filed a certificate which was in all respects a compliance with the statute, unless the statement therein as to the ownership of the property was insufficient. This statement was as follows: "Said lot of land being owned, to the best of my knowledge and belief, by Catherine Broderick, of said Chelsea." In fact, the property was owned by the defendant McNamara, but the petitioner believed that the defendant Broderick was the owner. The statute and the decisions regard it as important that the name of the owner should be given in the certificate, if it can be done, because, otherwise, subsequent purchasers who buy upon the faith of the registry title are liable to be misled; and it has been held that, if a petitioner knows the true owner, and gives a wrong name in his certificate, it avoids the certificate, and he loses his lien: *Kelly v. Laws*, 109 Mass. 395; *Amidon v. Benjamin*, 128 Mass. 534.

But the statute contemplates that there may be cases where the name of the owner need not be given in the certificate. The name is to be given "if known." This implies that if the name is not known to the petitioner, the certificate is good if it does not name the owner. In this case the petitioner did not know the owner, and thus it differs from *Kelly v. Laws* and *Amidon v. Benjamin*, *supra*.

This case, then, is one where the name of the owner is unknown. If the certificate had so stated, no fault could be found with it. Does the fact that the petitioner innocently states his belief that the respondent Broderick is the owner vitiate the certificate? So to hold would be to import into the statute a provision not found there. We are of opinion that this cannot be done, especially in a case like this, where the honest mistake of the petitioner has not in any way misled or injured the respondents.

Judgment accordingly.

CERTIFICATE OF MECHANIC'S LIEN, WHAT REQUIRED TO STATE: *Bank of Charleston v. Curtis*, 46 Am. Dec. 325; *Shaw v. Barnes*, 47 Id. 399; *Knabb's Appeal*, 51 Id. 478; *Kennedy v. House*, 80 Id. 594.

GRANITE NATIONAL BANK v. FITCH.

[145 MASSACHUSETTS, 567.]

PARTIAL PAYMENT BY GUARANTOR OF NOTE DOES NOT DISCHARGE MAKER PRO TANTO, if such payment be made upon the agreement that the payee shall hold the note as security to the guarantor for the amount paid, as well as for the balance remaining due the payee.

NEW NOTE FOR BALANCE DUE ON ORIGINAL ONE IS NOT TO BE TREATED AS PAYMENT THEREOF, when the new note was sent by the makers to the holder of the original, but was never discounted or paid, or accepted in discharge of the original.

CONTRACT against R. G. Fitch, A. P. Moore, and J. E. Moore, upon a promissory note signed by them and guaranteed by D. Alden and J. W. Bradbury. The action was discontinued as to all the defendants except Fitch. It appeared that after a portion of the note had been paid by the makers, the guarantors paid the principal part of the balance, leaving the sum of \$217.50 still due, upon the agreement that the bank should hold the note as security to the guarantors for the amount paid by them, as well as for the balance remaining due to itself. The defendants A. P. and J. E. Moore subsequently sent to the bank their note for the balance of \$217.50; but such note was never discounted or paid, or accepted by the bank in discharge of the original note. The court ruled that the foregoing facts which it found constituted no defense, and found for the plaintiff for the full amount of its claim, with interest. The defendant alleged exceptions.

R. D. Smith and M. M. Weston, for the plaintiff.

Z. S. Arnold, for the defendant.

By Court, C. ALLEN, J. The guarantors made a partial payment upon the note in suit, but it is found by the court that the payment was made upon the agreement that the payee and holder of the note should hold it as security to the guarantors for the amount paid by them as well as for the balance remaining due to the payee. This was equivalent to an agreement that the sum paid by the guarantors should not be deemed a payment for or on account of the parties primarily liable to pay the note, but that the note should be kept alive, in order to be put in suit for the benefit of the guarantors. If they had paid the whole amount of the note, there is no doubt that they might have taken an indorsement to themselves, and brought suit upon it in their own names.

It is not necessary to determine whether, in the absence of

any express understanding, a payment in whole or in part by guarantors will have the effect to extinguish the note wholly or *pro tanto*; though this result is often broadly denied: See Story on Promissory Notes, sec. 400; Byles on Bills, 7th Am. ed., 173, 224, 225. But clearly, where there is an agreement that the note shall be kept alive, such payment does not discharge the makers: *Pinney v. McGregory*, 102 Mass. 186; *McGregory v. McGregory*, 107 Id. 543; *Pacific Bank v. Mitchell*, 9 Met. 297, 302; *Williams v. James*, 15 Q. B. 498; *Jones v. Broadhurst*, 9 Com. B. 173; *Thornton v. Maynard*, L. R. 10 C. P. 695.

As to the subsequent transaction, by which two of the makers sent to the holder of the note their new note for the balance remaining due beyond the amount paid by the guarantors, it is expressly found that the holder did not accept such new note in discharge of the original note; and under such circumstances, according to the well-settled doctrine, the new note is not to be treated as payment: *Cotton v. Atlas National Bank*, 145 Mass. 43, 45.

Exceptions overruled.

NOTE GIVEN FOR PRE-EXISTING DEBT IS NOT PAYMENT THEREOF, UNLESS SO AGREED: *Berry v. Griffin*, 69 Am. Dec. 123, and note; *Tyner v. Stoops*, 71 Id. 241; *Blunt v. Walker*, 78 Id. 709; *Weymouth v. Sanborn*, 80 Id. 144; *Winsted Bank v. Webb*, 100 Id. 435; *Roberts v. Fisher*, 3 Am. Rep. 680; *Gibson v. Tobey*, 7 Id. 397; *Moses v. Trice*, 8 Id. 609; *Hoopes v. Strasberger*, 11 Id. 538; *Nightingale v. Chafee*, 23 Id. 531; *Hunter v. Moul*, 42 Id. 610.

BROOKS v. BROOKS.

[145 MASSACHUSETTS, 574.]

EVIDENCE OF SEXUAL INTERCOURSE AND FAMILIARITIES, PRIOR TO MARRIAGE, with person with whom adultery is charged, is admissible, in a libel for divorce on the ground of adultery, to explain the character of ambiguous conduct between the same parties after marriage, which is relied on as evidence of the act of adultery in issue.

LIBEL for divorce on the ground of adultery. The libellant offered evidence of sexual intercourse between the libelee and one Percival on the morning of her marriage to the libellant, and before the marriage, and of certain familiarities with Percival shortly prior to the marriage, consisting of visits by the libelee to Percival's room. The libelee objected to the evidence, but the court admitted it, on the ground that it tended to prove sexual intimacy with the same person who was

charged with adultery with the libelee after marriage, to support which other evidence had been offered and received without objection. The court found that the libelee was guilty of adultery with Percival after marriage. The libelee alleged exceptions to the admission of the evidence.

W. Gaston and T. E. Grover, for the libelant.

H. Dunham, for the libelee.

By Court, HOLMES, J. It is settled that evidence of indecent familiarities with the person with whom adultery is charged, and even of sexual intercourse with him, at other times after marriage, is admissible to explain the character of ambiguous conduct relied on as evidence of the act of adultery in issue: *Thayer v. Thayer*, 101 Mass. 111; 100 Am. Dec. 110; *Commonwealth v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346; *Commonwealth v. Merriam*, 14 Pick. 518; 25 Am. Dec. 420. There can be no doubt that evidence of sexual intercourse on the morning of the marriage, and of acts of familiarity shortly before, tends in like manner to explain doubtful conduct shortly after it. The objections, based on the general rules of evidence, are answered by *Thayer v. Thayer*, *supra*. It is said that marriage operates as an oblivion of all that is passed. But there is no reason for making of this rule a veil of fiction which prevents the facts from throwing their natural light on subsequent events: See *Weatherley v. Weatherley*, 1 Spinks, 193, 196; *Van Epps v. Van Epps*, 6 Barb. 320.

Exceptions overruled.

EVIDENCE IS ADMISSIBLE OF IMPROPER FAMILIARITIES, OTHER THAN THOSE ALLEGED, BETWEEN PARTIES, in actions for divorce, or criminal prosecutions for adultery: *Commonwealth v. Merriam*, 25 Am. Dec. 420, and note; *Thayer v. Thayer*, 100 Id. 110, and note; *Commonwealth v. Nichols*, 19 Am. Rep. 346.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

DONALDSON v. WILSON.

[60 MICHIGAN, 86.]

OWNER OF LANDS IS LIABLE IN DAMAGES TO ONE WHO, USING DUE CARE, COMES THEREON, at the invitation or inducement, express or implied, of such owner, on any business to be transacted with or permitted by him, for injuries occasioned by the unsafe condition of the premises, known to him, and suffered negligently to exist, and of which the injured party has no knowledge.

LANDLORD IS UNDER NO OBLIGATION TO SUBTENANT TO KEEP LEASED PREMISES IN REPAIR, and is therefore not liable in damages for injuries to the property of the subtenant caused by the falling of the building by reason of the defective condition of its walls, where the subletting and occupancy under it was without the knowledge, notice, or assent of the landlord, and in violation of a covenant not to sublet.

CASE by Susannah Donaldson against Samuel W. Odell. Judgment was rendered for Odell, who subsequently died, and the action was revived in the name of his executor, John R. Wilson. The plaintiff brought error. The facts are stated in the opinion.

C. C. Chamberlain, for the appellant.

Smith, Nims, Hoyt, and Erwin, for the defendant.

By Court, CHAMPLIN, J. Plaintiff brought an action on the case to recover the value of certain personal property destroyed in consequence of the falling of a building owned by Samuel W. Odell, the defendant's testator. Judgment was rendered for Odell, who subsequently died, and the suit was revived in the name of the defendant, as his executor.

From the evidence produced on the trial by the plaintiff, it "appears that for some time prior to the twentieth day of March, 1882, Brown and Friend were the owners of lot fifteen (15), of subdivision of block seven (7), of the city of Muskegon, on which was a two-story brick building, the foundations of which were in a defective condition; and that by reason of such defects the building fell to the ground in December following. On the twentieth day of March, 1882, Brown and Friend made a written lease of said lot and building to Charles R. Walters and Richard Sonenburg, for the term of one year from and after April 1, 1882. In the lease, Walters and Sonenburg agreed to pay for all repairs made during its life; not to assign nor transfer the lease, or to sublet the premises, or any part thereof, without the written assent of the lessors; to keep the premises, and every part thereof, during the continuance of the lease, in as good repair, and to yield them at the expiration of the term to the lessors in like condition, as when taken, reasonable use and wear and damage by the elements excepted. Walters and Sonenburg at once took possession, using the ground-floor for a saloon, and the second story as a residence, Sonenburg subsequently selling out to Walters, who continued in possession, running the saloon until the building fell. In May, 1882, Brown and Friend sold the premises to S. W. Odell, subject to the lease to Walters and Sonenburg, and assigned the lease to him. In September, 1882, the plaintiff, without Odell's knowledge or assent, rented from Walters rooms in the second story of the building, which she occupied as a residence until December 28, 1882, when the building fell, and her property was damaged. The plaintiff knew nothing of the defective condition of the building, nor did she know who owned it. In March or April, 1882, Brown and Friend had the building examined, but the testimony does not show that Odell had any knowledge of its condition."

The ground of action alleged in plaintiff's declaration rests on a breach of duty to repair the building, which was imposed on Odell by reason of his ownership. In order to sustain her action, it was incumbent on the plaintiff to show that Odell owed her a clear legal duty to keep the premises in repair.

The plaintiff claims that it was the duty of Odell to have taken such care of the foundation walls of his building that they should not, from natural and a very ostensible decay, precipitate the building upon the property of the plaintiff;

that the extremely defective and dangerous condition of the walls was so obvious, that if Odell did not know it, he ought to have known it.

It is well established that the owner of lands is liable in damages to those coming thereon, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises, which is known to him and not to them, and which he has suffered negligently to exist, and of which they have received no notice: *White v. France*, L. R. 2 C. P. Div. 308; 21 Eng. Rep. 305; *Dublin W. & W. R'y Co. v. Slattery*, L. R. 3 App. Cas. 1155; 24 Eng. Rep. 713; *Hartwig v. Chicago & N. W. R'y Co.*, 49 Wis. 358; *Hayward v. Merrill*, 94 Ill. 349; *Camp v. Wood*, 76 N. Y. 92; 32 Am. Rep. 282; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175; *Davis v. Central Cong. Society*, 129 Mass. 367; 37 Am. Rep. 368; *Nickerson v. Tirrell*, 127 Mass. 236; *Carleton v. Franconia Iron etc. Co.*, 99 Id. 216; *Bennett v. Railroad Co.*, 102 U. S. 577; *Samuelson v. Cleveland Iron Mining Co.*, 49 Mich. 170; 43 Am. Rep. 456, and cases there cited.

But neither the plaintiff nor her goods were upon Odell's premises by any invitation or inducement from him. There were no business transactions between her and the owner. She entered upon the premises and placed her property there without Odell's knowledge or permission, and in violation of his rights. Plaintiff claims that inasmuch as she rented the rooms which she occupied of Walter in September, and continued in such occupancy until in December, when the building fell, the assent of Odell to the subletting ought to be presumed. But there is no evidence in the case which shows, or tends to show, that Odell had either knowledge or notice of the subletting, or of her occupancy of the premises; and unless he did have such notice or knowledge, there is no foundation for presuming that he assented thereto. It therefore appears that defendant's testator owed to plaintiff no duty to keep the premises in repair. The cases cited in defendant's brief fully support the views above expressed.

The judgment must be affirmed.

OWNER OF LANDS, WHEN LIABLE FOR INJURIES TO PERSONS COMING ON PREMISES: See *Zoebisch v. Tarbell*, 87 Am. Dec. 660, and note discussing the question; *Sweeney v. Old Colony etc. R. R.*, 87 Id. 644, and note; *Elliott v. Pray*, 87 Id. 653; *Tobin v. Portland etc. R. R.*, 8 Am. Rep. 415, and note; *Campbell v. Portland Sugar Co.*, 16 Id. 503; *Toledo etc. R'y v. Grush*, 16 Id.

618; *Keffe v. Milwaukee etc. R'y*, 18 Id. 393; *Pierce v. Whitcomb*, 21 Id. 120; *Severy v. Nickerson*, 21 Id. 514; *Illinois Central R. R. v. Godfrey*, 22 Id. 112; *Beck v. Carter*, 23 Id. 175; *McAlpin v. Powell*, 26 Id. 555, and note; *Finch v. Board of Education*, 27 Id. 414; *Gramlich v. Wurst*, 27 Id. 684; *Parker v. Portland Publishing Co.*, 31 Id. 262; *Camp v. Wood*, 32 Id. 282; *Hayward v. Miller*, 34 Id. 229; *Murray v. McShane*, 36 Id. 367; *Davis v. Central Congregational Society*, 37 Id. 368; *Low v. Grand Trunk R'y*, 39 Id. 331; *Buesching v. St. Louis Gaslight Co.*, 39 Id. 503; *Lary v. Cleveland etc. R. R.*, 41 Id. 572; *Campbell v. Boyd*, 43 Id. 740; *Gillespie v. McGowen*, 45 Id. 365; *Nave v. Flack*, 46 Id. 205; *Parker v. Barnard*, 46 Id. 450; *Graves v. Thomas*, 48 Id. 727; *Evansville etc. R. R. v. Griffin*, 50 Id. 783; *Larmore v. Crown Point Iron Co.*, 54 Id. 718; *Croghan v. Schiele*, 55 Id. 88; *Calder v. Smalley*, 55 Id. 270; *Schmidt v. Abernethy*, 59 Id. 16, and note; *Delay v. Savage*, ante, p. 429.

LANDLORD'S LIABILITY TO THIRD PERSONS FOR INJURIES CAUSED BY DEFECTIVE CONDITION OF PREMISES: See *Inhabitants of Milford v. Holbrook*, 85 Am. Dec. 735, and note; note to *Polack v. Pioche*, 95 Id. 123; *Shipley v. Fifty Associates*, 3 Am. Rep. 346; 8 Id. 318; *Fisher v. Thirlkell*, 4 Id. 422; *Irvine v. Wood*, 10 Id. 603; *Leonard v. Storer*, 15 Id. 76, and note; *Clancey v. Byrne*, 15 Id. 391, and note; *Jaffe v. Harteau*, 15 Id. 438; *Campbell v. Portland Sugar Co.*, 16 Id. 503; *Swords v. Edgar*, 17 Id. 295; *Burdick v. Cheadle*, 20 Id. 767; *Helwig v. Jordan*, 21 Id. 189; *Shindelbeck v. Moon*, 30 Id. 584; *Mellen v. Morrill*, 30 Id. 695; *Nash v. Minneapolis Mill Co.*, 31 Id. 349; *Ryan v. Wilson*, 41 Id. 384; *Edwards v. New York etc. R. R.*, 50 Id. 659; *Ingwersen v. Rankin*, 54 Id. 109; *Wolf v. Kilpatrick*, 54 Id. 672; *Calder v. Smalley*, 55 Id. 270; *Kalis v. Shattuck*, 58 Id. 568; *Albert v. State*, 59 Id. 159; *Pierce v. Savings Society*, ante, p. 433; *Delay v. Savage*, ante, p. 429.

LANDLORD'S LIABILITY TO TENANT FOR INJURIES CAUSED BY DEFECTIVE CONDITION OF PREMISES: See note to *Polack v. Pioche*, 95 Am. Dec. 118; *Doupe v. Genin*, 6 Am. Rep. 47; *Gill v. Middleton*, 7 Id. 548; *Marshall v. Cohen*, 9 Id. 170; *Jaffe v. Harteau*, 15 Id. 438; *Minor v. Sharon*, 17 Id. 122; *Cesar v. Karntz*, 19 Id. 164; *Glickauf v. Maurer*, 20 Id. 238; *Toole v. Beckett*, 24 Id. 54; *McAlpin v. Powell*, 26 Id. 555; *Looney v. McLean*, 37 Id. 295; *Jones v. Freidenburg*, 42 Id. 86, and note; *Krueger v. Ferrant*, 43 Id. 223; *McCarthy v. York County Savings Bank*, 43 Id. 591; *Purcell v. English*, 44 Id. 255; *Coke v. Gutkese*, 44 Id. 499; *Woods v. Naumkeag Steam Cotton Co.*, 45 Id. 344; *Bowe v. Hunking*, 46 Id. 471, and note.

LANDLORD'S LIABILITY TO SUBLESSEE FOR INJURIES CAUSED BY DEFECTIVE CONDITION OF PREMISES: See *Cole v. McKey*, 57 Am. Rep. 293.

MICHIGAN LAND AND IRON COMPANY v. DEER LAKE COMPANY.

[60 MICHIGAN, 148.]

TREBLE DAMAGES, UNDER SECTION 7957, HOWELL'S STATUTES OF MICHIGAN, FOR CUTTING TIMBER ON LAND OF ANOTHER, are in their nature punitive, and are not designed to be inflicted in any case not involving something like willful wrong. They cannot arise from mere neglect, but must come from active misconduct.

BURDEN OF PROOF OF SHOWING THAT TRESPASS WAS CASUAL AND INVOLUNTARY IS UPON DEFENDANT, where treble damages are claimed by the plaintiff, under section 7957, Howell's Statutes of Michigan, for cutting timber on his land.

MEASURE OF DAMAGES FOR TIMBER CUT BY TRESPASSER ON LAND OF ANOTHER, BUT NOT REMOVED, is the value of the timber standing, where the owner did not refuse to allow the timber to be removed by the trespasser, and where he tried to sell the timber, but could not, and subsequently it was destroyed by fire, although it seems if the owner had refused to permit the trespasser to remove the timber, its value upon the ground would then have been deducted.

TRESPASS. The facts are stated in the opinion. The principal question in the case related to the plaintiff's right to recover treble damages, under section 7957, Howell's Statutes of Michigan, as follows: "Every person who shall cut down or carry off any wood, underwood, trees, or timber, or shall girdle or otherwise despoil or injure any trees on the land of any other person, without the leave of the owner thereof, or on the lands or commons of any city, township, village, or other corporation, without license therefor given, shall be liable to the owner of such land, or to such corporation, in three times the amount of damages which shall be assessed therefor in an action of trespass, by a jury, or by a justice of the peace, in the cases provided by law"; and section 7958, which provides: "If, upon the trial of any such action, it shall appear that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that such wood, trees, or timber were taken for the purpose of making or repairing any public road or bridge, judgment shall be given to recover only the single damages assessed."

Ball and Hansom, for the plaintiff.

E. E. Osborn and Henry A. Chaney, for the defendant.

By Court, MORSE, J. The main question in this case relates to the recovery of treble damages under the statute by the plaintiff.

The plaintiff brought suit and recovered judgment in an action of trespass against the defendant, for the cutting down and carrying off of pine timber growing upon its lands.

The timber was cut by the servants of the defendant, under the direction of its foreman.

The objections to the verdict, which was that the trespass was casual and involuntary, are confined to alleged errors of the court in his instructions to the jury.

It is asserted by counsel for the plaintiff that although the circuit judge undertook to charge the jury that the burden was upon the defendant to show that the trespass was casual or involuntary, yet, in effect, he instructed them quite the opposite, as follows: "In determining this question, there must be some evidence of willfulness, wantonness, or evil design on the part of Perry (defendant's foreman), who committed the trespass. Negligence alone is not sufficient to create liability in a case of this kind. If Perry . . . honestly believed . . . he was on the lands of defendant, he would not be liable for the trespass himself in treble damages, nor would the defendant in the case."

This is claimed to be equivalent to saying that the plaintiff must produce that character of evidence before the defendant would be liable under the statute.

The instruction of the court in this respect was correct, and in harmony with the previous decisions of this court. Treble damages under this statute are in their nature punitive, and it cannot be assumed that they were designed to be inflicted in any case not involving something like willful wrong. Such damages cannot arise from mere neglect, but must come from active misconduct: *Shepard v. Gates*, 50 Mich. 498; *Wallace v. Finch*, 24 Id. 255-259. The court clearly put the burden upon the defendant to show that the trespass was casual or involuntary, as follows: Mr. Ball, for plaintiff: "I ask your honor to charge the jury that the burden of proof is upon the defendant to show the trespass casual and involuntary, and not upon the plaintiff to show it was willful."

By the court: "That is so, gentlemen."

The court also instructed the jury that the defendant was liable for the damage done to the land, if any, by cutting and removing the timber. As to the timber cut and not carried away, but left upon the land by the defendant, the court charged the jury that the defendant was liable only in case

the plaintiff had no opportunity to sell or dispose of it. This is assigned as error.

From the evidence it appears that there was some correspondence between the parties in reference to the logs left upon the land. There was no particular dispute about the quantity cut. It is practically conceded on both sides that defendants cut and carried away about 6,500 feet, and left upon the land about 72,000 feet, of which some 18,000 feet were not merchantable. Defendant wrote Horatio Seymour, Jr., who had plaintiff's interests in charge, making an offer for the logs,—61,665 feet at four dollars per thousand,—coupling said offer with the following condition: "This to cover the matter of trespass on section 17 in full; we to have the logs, and permission to remove them." Seymour, in behalf of plaintiff, replied that he was willing to take defendant's estimate of the logs, but refused to take the amount offered in full settlement of the trespass, claiming willful negligence in defendant amounting to willful trespass, and stating that for \$316.62 he would settle in full. Defendant then wrote, declining to take the logs, and made another offer to cover the damage to freehold and the value of the logs removed, amounting to \$54, which last offer Seymour refused.

The court's charge in full in relation to the logs cut, but not removed, was as follows: "As to the question of damages, it appears that some of the timber, as I have said, had been removed, the rest remaining skidded upon the land. When Rood ascertained that the trespass had been committed, he then entered into negotiations, as I have said, to settle the matter, and obtain the title to the timber. These negotiations did not result in a settlement. The defendant had no right to enter upon the lands to remove the timber that was cut down and skidded, because in so doing he would be guilty of a fresh trespass.

"The plaintiff claims that he is liable for the value of the timber so removed from the realty, and left upon the land in the manner indicated. The defendant claims that it was the duty of the plaintiff to dispose of the timber, if there was a chance to dispose of it and sell it, and that he cannot recover in damages for the value of the timber, if such was the case.

"I charge you, gentlemen, that if the plaintiff, after ascertaining that the timber was cut upon the land, had an opportunity to dispose of it,—to sell it,—it was his duty to do so; and if he did not do so, he cannot recover for the value of the

timber that was cut and left upon the lands, or at least, for the price at which he might have sold it. For illustration: If a man trespass upon another's land, and cuts off one hundred cords of wood, and piles it up, and before moving it ascertains that he has trespassed upon another's land in doing so, and the owner of the land refuses to permit him to remove that wood, and refuses to sell it, he cannot recover for the value of that wood, provided he has a fair chance to sell and dispose of it.

"Such is the case with the timber in this case. It cannot be the law that although the defendant had done wrong—although it had committed a trespass—that the plaintiff can refuse to dispose of the property which has been cut, when it had an opportunity to do so, and then recover for its value of the defendant. Of course, if you find from the testimony that the plaintiff had no chance or opportunity to sell the timber so cut and skidded, then of course the defendant would be liable for its value."

There was no evidence other than the correspondence between Seymour, on the part of the plaintiff, and Rood, on the part of the defendant, showing, or tending to show, any refusal on the plaintiff's part to allow defendant to take away the logs cut. Neither was there any refusal to do so in the letters of Seymour. The defendant offered so much in settlement of the whole claim for trespass, it to take the logs with permission to remove them. Plaintiff did not refuse such permission, but would not settle the trespass unless a larger sum of money was paid than defendant tendered by its letter.

Under these circumstances, it seems to us that the charge of the court was incorrect. The testimony further shows that after the negotiations for settlement were broken off, plaintiff tried to sell the logs, and could not. The logs were subsequently destroyed, or nearly so, by fire. The plaintiff was entitled to have these pine trees standing upon its land. They would have remained so had it not been for the trespass of the defendant. It would seem, upon natural principles, that the plaintiff ought to recover the value of the timber standing,—what it would have been worth if not cut down. If plaintiff had refused to let defendant take the logs away, it would have been different,—the value of the logs upon the ground might have then been deducted.

In *Wood v. Elliott*, 51 Mich. 320, this court decided that cutting the standing timber belonging to another, although

the land belonged to the trespasser, and the plaintiff only had the right to the timber by removing it within a reasonable time, was a conversion, and the plaintiff was entitled to the actual value of the timber. The defendant, in that case, cut down the timber, and converted it into wood. In mitigation of damages, he pleaded that the wood belonged to the plaintiff. The circuit court instructed the jury that he was liable for the full value of the timber standing, and this court sustained the charge: See also 2 Waterman on Trespass, sec. 1098; *Sanderson v. Haverstick*, 8 Pa. St. 294; *Sampson v. Hammond*, 4 Cal. 184; *Moody v. Whitney*, 34 Me. 563; *Indianapolis, P. & C. R. Co. v. Mustard*, 34 Ind. 50; *Champion v. Vincent*, 20 Tex. 811.

There was no evidence tending to show an election upon the part of plaintiff to keep the logs. The wood illustration was not supported by the evidence, yet the court said: "Such is the case with the timber in this case," thus virtually instructing the jury that plaintiff had refused to let defendant remove the logs. There is nothing in the record tending to show any such refusal.

For this error, the judgment must be reversed, and a new trial granted, with costs of this court.

SHERWOOD, J. I concur in the result at which my brethren have arrived in this case, but cannot agree with them as to the character of the acts of the defendant necessary to be shown to entitle the plaintiff to recover treble damages, under the statute, for the injury sustained.

When negligence is indulged to the extent of showing utter disregard for the property rights of another, it becomes wanton, and under it, acts of trespass committed become willful, or amount to the same thing.

The testimony in this case strongly tended to show the acts of the defendant to be of that character, and the jury should have been permitted to take this view of the subject. They, however, were precluded from doing so under the charge of the court. It is idle to talk about a party acting in good faith while taking and converting the property of another to his own use without knowing, or making an effort to know, whether he has any right to it or not. In this case, the defendant took no means which would enable its foreman to correctly ascertain the boundaries of its own property, or to ascertain whether or not its servants were trespassing in cutting the

timber claimed for. Such lawlessness and disregard for the rights and interests of others are little less than vandalism, and never accompany or characterize acts done in good faith, and I can never consent they should receive the sanction of courts as such.

The charge of the court upon the subject of negligence, in my judgment, was not correct. The circuit judge should have told the jury they might find the acts of the defendant in cutting the plaintiff's timber wanton from the grossness of the negligence alone, and if they found such to be the fact, the plaintiff would be entitled to recover treble damages under the statute.

For this error, as well as the other pointed out by my brethren, the judgment should be reversed, and a new trial granted.

STATUTORY PENALTIES FOR CUTTING DOWN, INJURING, DESTROYING, OR CARRYING AWAY TIMBER. — Statutes in several of the states, as in Michigan, provide that if any person shall cut down, injure, destroy, or carry away trees or timber on the land of another, without the latter's consent, the offender shall be liable to the owner of the land in treble damages, or, according to another form, shall forfeit to the owner a certain sum for each tree so cut, injured, destroyed, or carried away. A few of these statutes expressly enact that if it appears that the trespass was casual and involuntary, or that the trespasser had probable cause to believe that the land on which the trespass was committed was his own, single damages only can be recovered; but whether they so enact or not, it is uniformly held that to subject a party to treble damages, or to a forfeiture, as the case may be, he must have committed the wrong knowingly and willfully, or under such circumstances as to make him guilty of inexcusable negligence: *Russell v. Irby*, 13 Ala. 131; *Barnes v. Jones*, 51 Cal. 303; *Cushing v. Dill*, 2 Scam. 460; *Whitcraft v. Vanderver*, 12 Ill. 235; *Cushman v. Oliver*, 81 Id. 444, 446; *Wagstaff v. Schippel*, 27 Kan. 450; *Russell v. Myers*, 32 Mich. 522; *Wallace v. Finch*, 24 Id. 255; *Mhoon v. Greenfield*, 52 Miss. 434; *McCleary v. Anthony*, 54 Id. 708; *Keirn v. Warfield*, 60 Id. 799; *Baker v. Hamilton etc. R. R.*, 36 Mo. 543; *Schmidt v. Densmore*, 42 Id. 225; *Brown v. Carter*, 52 Id. 46, 48; *Batchelder v. Kelly*, 10 N. H. 436; 34 Am. Dec. 174, and note; *Morrison v. Bedell*, 22 N. H. 234, 237; *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326; but see *Wright v. Brown*, 5 Kan. 600. So where a statute provides that whosoever shall convert to his own use, without the consent of the owner, logs or lumber, shall be liable to the owner in treble damages, it must be held to apply only to cases in which some element of willfulness, wantonness, or evil design enters into the act: *Cohn v. Neeves*, 40 Wis. 393. A trespass committed through an innocent mistake as to the boundary lines is, therefore, not within the contemplation of the statute; *Russell v. Irby*, 13 Ala. 131; *Barnes v. Jones*, 51 Cal. 303; nor can treble damages be recovered where the trespasser had probable cause for supposing he had title himself, or that he had authority from the real owner: *Russell v. Myers*, 32 Mich. 522; nor is a railroad company liable in such damages where it acts in good faith, under a supposed authority conferred upon it by its charter: *Lindell v. Hannibal etc. R. R.*, 25

Mo. 550. It would not be sufficient to show that the trees were cut by persons employed by the defendant to cut timber on his own land, and appropriated by them to the use of the defendant: *Cushing v. Dill*, 2 Scam. 460; and where the master would not be liable if he cut the trees himself, he will not be liable for the acts of his servants in obeying his instructions: *Russell v. Irby*, 13 Ala. 131; but a master is liable for a trespass committed by his servants, with his knowledge and approbation, or subsequent sanction: *Ecum v. Brister*, 35 Miss. 391; and if one, intending to commit a trespass on public lands, through mistake cuts down trees on the land of an individual, he is liable under the statute: *Givens v. Kendrick*, 15 Ala. 648; *Perkins v. Hackel-man*, 26 Miss. 41; 59 Am. Dec. 243; *Emerson v. Beavans*, 12 Mo. 511. The burden of showing probable cause, or unintentional mistake, and reasonable care to avoid it, is on the defendant: *Walther v. Warner*, 26 Id. 143; *Holli-day v. Jackson*, 21 Mo. App. 660; *Keirn v. Warfield*, 60 Miss. 799.

Treble damages can only be allowed in case single damages are assessed: *Clark v. Field*, 42 Mich. 342. The jury can only assess single damages. When a proper case is made out for trebling the damages, it can only be done by the court: *Brewster v. Link*, 28 Mo. 147; and see *Newcomb v. Butterfield*, 8 Johns. 342; and as the jury can lawfully assess single damages only, it will be presumed that they have done so, in the absence of anything to the contrary, so that the court may treble the damages: *Cooper v. Martin*, 6 Mo. 634; *George v. Rook*, 7 Id. 149. The court in Missouri is not authorized to treble the damages assessed by the jury in a general verdict, in a case where the petition contains counts under the statute and at common law: *Low v. Harrison*, 8 Id. 350; *Brewster v. Link*, *supra*; *Shrewsbury v. Bawolitz*, 57 Id. 414; nor where the petition claims for a wrongful entry, and for timber cut and carried away, and the verdict is general, not finding the value of the timber: *Ewing v. Leaton*, 17 Id. 465; *Labasme v. Woolfolk*, 18 Id. 514; *Herron v. Hornback*, 24 Id. 492; but these decisions are made under a statute which provides that "the party so offending shall pay to the injured party treble the value of the thing so injured, broken, destroyed, or carried away." In Michigan and in New York, where the statutes are the same, the offender is to pay treble the damages assessed for the trespass: *Achey v. Hull*, 7 Mich. 423; *Van Deusen*, 29 N. Y. 9, 25.

The word "owner," as used in the statutes, means the person who has the estate in fee. Therefore, to maintain an action under the statute, the plaintiff must aver and prove that he was the owner of the land in fee: *Wright v. Bennett*, 3 Scam. 258; *Whiteside v. Divers*, 4 Id. 336; *Jarrot v. Vaughn*, 2 Gilm. 132; *Clay v. Boyer*, 5 Id. 506; *Edwards v. Hill*, 11 Ill. 22; *Abney v. Austin*, 6 Ill. App. 49; *Missouri etc. R'y v. Robbins*, 10 Kan. 473; *Achey v. Hull*, 7 Mich. 423; *McOleary v. Anthony*, 54 Miss. 708; but the owner may recover whether he be in possession or not: *Fitzpatrick v. Gebhart*, 7 Kan. 35; *Sullivan v. Davis*, 29 Id. 28. The objection that the declaration does not contain a sufficient averment of the plaintiff's ownership to support a finding in his favor should be raised by demurrer: *Clark v. Field*, 42 Mich. 342. It has also been held that the United States is a "person," within the statute of Kansas, which makes it an offense for any person to cut down, injure, destroy, or carry away any tree "standing, being, or growing on the land of any other person": *State v. Herold*, 9 Kan. 194.

MEASURE OF DAMAGES IN TRESPASS OR TROVER FOR TIMBER CUT ON ANOTHER'S LAND: See *Foot v. Merrill*, 20 Am. Rep. 151; *Isle Royal Mining Co. v. Herbin*, 26 Id. 520; *Railway Co. v. Hutchins*, 30 Id. 629; *Tilden v. Johnson*, 26 Id. 769, and note; *Tuttle v. White*, 41 Id. 175; *Skinner v. Pinney*, 45 Id. 1.

Ayres v. Hubbard, 58 Id. 361; and see *Herdic v. Young*, 93 Am. Dec. 739; and for coal or ore mined on another's land, see *Barton Coal Co. v. Cox*, 17 Am. Rep. 525; *Illinois etc. Coal Co. v. Ogle*, 25 Id. 342; *Waters v. Stevenson*, 29 Id. 293; *McLean County Coal Co. v. Lennon*, 33 Id. 64, and note; *Franklin Coal Co. v. McMillan*, 33 Id. 280; *Austin v. Huntsville Coal etc. Co.*, 37 Id. 446; *Blaen Avon Coal Co. v. McCulloch*, 43 Id. 560, and note; *Coal Creek Mining etc. Co. v. Moses*, 54 Id. 415, and note.

PEOPLE EX REL. DAFOE v. HARSHAW.

[60 MICHIGAN, 200.]

PROVISION IN CITY CHARTER THAT "COMMON COUNCIL SHALL BE JUDGE OF ELECTION AND QUALIFICATIONS OF ITS OWN MEMBERS, and shall have the power to determine contested elections," is conclusive, and not subject to review.

MAYOR OF CITY IS MEMBER OF COUNCIL, within the meaning of a provision in its charter that "the common council shall be the judge of the election and qualifications of its own members, and shall have the power to determine contested elections," when the charter also provides that "the mayor, recorder, and aldermen, when assembled together and organized, shall constitute the common council of the city."

LEGISLATURE HAS POWER TO LEAVE CITIES TO DETERMINE TITLE OF THEIR OWN OFFICERS without further review; for the remedy by information, as well as by *quo warranto*, is not a matter of right, but of discretion, and may be withheld by the legislature.

INFORMATION to determine the title of the respondent to the office of mayor of the city of Alpena. The opinion states the facts.

L. G. Dafoe and R. J. Kelley, for the relator.

A. R. McDonald and J. D. Turnbull, for the respondent.

By Court, CAMPBELL, C. J. The present proceeding by information in the nature of *quo warranto* was filed to determine the title of respondent to the office of mayor of Alpena. The plea averred an election, and subsequent determination by the common council that he was duly elected. The only question is, whether the action of the common council is final in such matters.

By the charter of Alpena it is provided that "the mayor, recorder, and aldermen, when assembled together and organized, shall constitute the common council of the city of Alpena," etc.: Laws of 1871, vol. 2, sec. 6, p. 79. All of the corporate powers of the city are vested in this body. By section 15 it is declared that "the common council shall be the judge of the election and qualifications of its own members,

and shall have the power to determine contested elections, to compel the attendance of absent members, to determine the rules of proceedings, and pass all by-laws and rules necessary and convenient for the transaction of business not inconsistent with the provisions of this act."

As this court has on several occasions determined that where such a provision is contained in a city charter it is conclusive, there is no occasion to discuss the question of authority: *People v. Mayor of Port Huron*, 41 Mich. 2; *Cooley v. Ashley*, 43 Id. 458; *Alter v. Simpson*, 46 Id. 138; *Doran v. De Long*, 48 Id. 552. The same provision is found in many of our charters, and is incorporated in the general statutes for the incorporation of cities: Howell's Statutes, sec. 2514.

There can be no doubt that under the section in question the mayor is a member of the common council.

City charters here, as in England, do not always agree in the constituents of this body. In some cases there is a separate council, which is only one of the parts of the city legislature, and requiring the approval of another board, or of the mayor, acting separately, as the governor does, to complete their action. But most of our cities in their earlier stages, if not permanently, have had a council where the mayor sits in person, and over whose action he has no veto. And in all such corporations he has been deemed a member as clearly as the alderman; and so far as any such provision as this is concerned, there appears to be no reason for a distinction.

The value and importance of the remedy by information, where not otherwise provided for, is recognized. But that remedy, as well as the one by the old writ of *quo warranto*, never existed as a matter of right, but was subject to the discretion of the court in disputes concerning corporate officers. The courts exercised a broad discretion, and in offices of short duration there is not much to favor interference in ordinary cases. In *Rex v. Dawbeny*, Strange, 1196, it was held not proper in the case of a church-warden, who, although having important local functions, was chosen annually. The information in its modern form is a statutory and not a common-law proceeding; and where a remedy is not one of right, but of discretion, it would be going too far to hold that it could not be withheld by the legislature in cases where formerly the courts could have withheld it.

Our constitution in express terms vests all the judicial power in courts, and no such power can exist in a legislative body.

It has nevertheless been deemed wise to avoid the delays and difficulties of legal disputes, to provide for a final adjudication of the title to office, not only of members of the legislature, but of all the state officers and judges, either in the houses of the legislature or in the board of state canvassers: *People v. Goodwin*, 22 Mich. 496. Our legislature has been careful to leave these matters in all proper cases open to judicial controversy; but in cities, where the tenure of office is short, and is of local rather than general interest, it has been common from a very early period in creating these municipal legislatures to give them the same power of determination in local offices that is given to the state legislature, or its houses, in state offices.

In *People v. Sweeting*, 2 Johns. 184, the supreme court of New York denied leave to the attorney-general to file an information against a local officer, when there could be no determination of the case before a new election. The same rule was laid down by the supreme court of Massachusetts in *Commonwealth v. Athearn*, 3 Mass. 285; and in *State v. Tudor*, 5 Day, 329, 5 Am. Dec. 162, where a case came up on error, the supreme court of Connecticut, although discovering error, refused to send the case back for a new trial after the office had expired. All of these cases show that the remedy is, at common law, not a matter of right, and being so, it cannot be held beyond the power of the legislature to leave cities to determine the title of their own officers without further review.

Judgment was rightly given for defendant, and should be affirmed.

CHAMPLIN, J. I concur in the result.

INFORMATION TO QUESTION TITLE OF MEMBER OF CITY COUNCIL WILL NOT LIE when the city charter makes the council the judge of the election and qualifications of its own members: See note to *People v. Rensselaer etc. R. R.*, 30 Am. Dec. 49.

QUO WARRANTO IS NOT WRIT OF RIGHT, but rests in the discretion of the court: Note to *People v. Rensselaer etc. R. R.*, 30 Am. Dec. 50; *Commonwealth v. Arrison*, 16 Id. 531; but see *State v. Harris*, 36 Id. 460. It will not be issued where the term of office has expired, or will expire, before the trial: *State v. Tudor*, 5 Id. 162; *People v. Loomis*, 24 Id. 33.

PEOPLE v. BARKER.

[60 MICHIGAN, 277.]

OPINION WHICH DISQUALIFIES JUROR IN CRIMINAL CASE is of that fixed character which repels the presumption of innocence of the accused, who is already condemned in the juror's mind; and such disqualification does not arise because it will require some evidence to remove impressions or opinions formed from rumors, newspaper statements, or other sources.

SOURCES OF INFORMATION ARE IMPORTANT IN DETERMINING EFFECT LIKELY TO HAVE BEEN PRODUCED UPON MIND OF JUROR, in a criminal case, and the influence likely to be exerted upon his judgment; but impressions made upon the mind which lead towards certain conclusions, whether reached or not, will always require other impressions to be made to eradicate the former ones, or to lead to different conclusions, or in other words, will require some evidence to remove them.

QUESTION WHETHER JUROR IN CRIMINAL CASE IS DISQUALIFIED BY REASON OF HIS OPINION MUST BE ALWAYS ONE OF DEGREE; and the trier is called upon to determine whether the opinion entertained is of that fixed or permanent character which disqualifies him from coming to the case in a fair and impartial frame of mind, unaffected with prejudice or favor to either party.

ACCUSED IS NOT PREJUDICED BY IMPROPER OVERRULING CHALLENGE FOR CAUSE, where he thereupon peremptorily challenges the juror, and accepts a jury without exhausting his peremptory challenges.

COURT IS INVESTED WITH CERTAIN DEGREE OF DISCRETION IN SELECTION OF JURORS, which is to be exercised by seeing that proper and competent men are selected; and so long as the case of a party is not prejudiced by the exercise of such discretion, he cannot complain.

COURT MAY EXCLUDE JUROR FROM PANEL OF ITS OWN MOTION, where, during the impaneling, he exhibits such a reckless disregard of his duty as to make it quite evident that he is unfit to serve, by failing to appear in court at the time to which it had adjourned, and remaining in a room of a hotel, where he was found after an hour's search, playing pool.

COURT MAY ORDER JUROR DISCHARGED AND ANOTHER JUROR DRAWN IN HIS STEAD, where, after the jury had been selected and sworn, and before any further proceedings were had in the case, it was ascertained that such juror was an alien.

ALIEN IS NOT QUALIFIED IN ANY RESPECT TO SIT UPON JURY, IN MICHIGAN, and a jury selected and sworn, but containing an alien, consists of only eleven jurors.

ACCUSED IS NOT IN JEOPARDY, until a jury of twelve competent men are selected and sworn.

ERROR CANNOT BE ASSIGNED on a ruling to which no exception was taken.

OPINIONS OF MEDICAL EXPERTS HELD ADMISSIBLE, under the circumstances, in a criminal prosecution for murder, as to how death occurred.

CONFESSIONS ARE PRESUMED TO HAVE BEEN VOLUNTARILY MADE, in the absence of all evidence; and when the accused alleges the contrary, he is called upon to at least rebut such presumption.

EVIDENCE OF CONFESSIONS IS PROPERLY ADMITTED, where there was nothing at the time of their admission to show that they were not voluntary; although it subsequently appeared that a prior confession had been ob-

tained from the accused by such artifice and deception as rendered evidence thereof incompetent; but had the facts relating to the prior confession been shown before the subsequent confessions were offered, it would have been incumbent upon the prosecution to prove that the latter were not the result of illegal influence.

QUESTION WHETHER SUBSEQUENT CONFESSION WAS RESULT OF SAME INFLUENCE WHICH INDUCED PREVIOUS CONFESSION is one for the jury, under proper instructions from the court, where a subsequent confession is claimed to have been subject to the influence of an inducement held out or exercised to obtain a previous confession.

IT IS PROVINCE OF COURT TO DETERMINE WHETHER CONFESSION WAS VOLUNTARY OR NOT, in a case free from doubt, before admitting or rejecting the same as evidence; but if there is a conflict of testimony, or room for doubt, the court should submit the question to the jury, with instructions that if they were satisfied that there were inducements, they should disregard the confession.

NOTES AND LETTERS CONCERNING CRIME ARE ADMISSIBLE IN EVIDENCE WITHOUT FORMAL PROOF OF HANDWRITING, where a witness identifies them, and testifies that they were handed to him by one of the accused to be delivered to the other, but that he gave them to the sheriff or to his wife.

WITNESS, WHO IS SWORN AND GIVES SOME EVIDENCE, HOWEVER FORMAL, IS TO BE CONSIDERED WITNESS FOR ALL PURPOSES, and is subject to cross-examination upon all matters material to the issue.

INFORMATION for murder. The opinion states the facts.

Benjamin F. Heckert, S. D. Clay, and E. S. Eggleston, for the appellants.

Moses Taggart, attorney-general, and Lester A. Tabor, for the people.

By Court, CHAMPLIN, J. The respondents were informed against for murder, and were convicted of murder in the second degree. Marshall G. Barker was sentenced to imprisonment for life, and William K. Barker for the term of twenty-five years.

There are forty-nine assignments of error, which may be considered under three heads; namely, those relating to the selection of the jury; those relating to the introduction of expert testimony; and those relating to the alleged confessions of respondents.

1. The respondents claimed the right to challenge peremptorily sixty jurors, which was acceded to by the court. The qualification of the jurors challenged was tried and determined in open court by the circuit judge, who rejected some who were challenged for cause, and accepted others.

It is claimed by the counsel for respondents that the circuit judge erred in accepting certain jurors who were challenged

for cause of bias, or of entertaining opinions relative to the guilt or innocence of the respondents which would require evidence to remove. The constitution of this state provides that, "in every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury": Art. 6, sec. 28.

It was said in *Holt v. People*, 13 Mich. 228: "To require that jurors shall come to the investigation of criminal charges with minds entirely unimpressed by what they may have heard in regard to them, or entirely without information concerning them, would be, in many cases, to exclude every man from the panel who was fit to sit as a juror. With the present means of information, the facts or rumors concerning an atrocious crime are, in a very few hours, or days at farthest, spread before every man of reading and intelligence within the district from which jurors are to be drawn, and over the whole country, if the atrocity be especially great. And there are some crimes so great and striking that even the most ignorant will have information and impressions in regard to them; and the rule as stated, applied to such cases, would render the impaneling of a jury for their trial impossible, and make their very enormity a complete protection from punishment. Without attempting or endeavoring to lay down rules for all cases, it is sufficient for us to say that the showing in the present case falls far short of establishing cause for challenge. The juror is shown to have formed a partial opinion, but not a positive opinion. This opinion was not based upon anything which he had himself witnessed, or from information derived from those who claimed to know the facts, but upon street rumors. Now, when a person says that he has formed, from street rumors, a partial but not a positive opinion, we think he is to be understood as speaking only of those impressions which every one receives insensibly when a charge of crime is made, but which, so far from amounting to settled conviction, do not in the least preclude an impartial examination of the facts, when afterwards presented in the form of legal testimony."

This case was cited with approval in *Stephens v. People*, 38 Mich. 739. The opinion in this case was written by the same learned judge who wrote the opinion in *Holt v. People*, *supra*, and in this case he said: "The question on this record is, whether that jury can be an impartial one whose members are already so impressed with the guilt of the accused that evidence would be required to overcome such impressions. It seems to us that

this question needs only to be stated,—it calls for no discussion. This woman, instead of entering upon her trial supported by a presumption of innocence, was, in the minds of the jury when they were impaneled, condemned already; and by their own statements under oath, it is manifest that this condemnation would stand against her until removed by evidence. Under such circumstances, it is idle to inquire of jurors whether or not they can return just and impartial verdicts; the more clear and positive were their previous impressions of guilt, the more certain may they be that they can act impartially in condemning the guilty party. They go into the jury-box in a state of mind that is well calculated to give a color of guilt to all the evidence; and if the accused escapes conviction, it will not be because the evidence has established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so."

The subject came under review again in *Ulrich v. People*, 89 Mich. 246, and the court said "that it appeared that one of the jurors had formed and retained an opinion which evidence would be required to remove. It appeared upon examination of this juror that he had read a little about the case,—in all, about twenty lines; that from this he had formed an opinion, not of a fixed character, but which would require evidence to remove; and he believed that he would be able to render an impartial verdict according to the evidence submitted upon the trial. What the opinion was, whether favorable or unfavorable to the accused, did not appear. The showing as to the incompetency of this juror was insufficient. The opinion he had formed was not based upon anything he had himself witnessed, or from information derived from any one who claimed to know the facts, but from reading a few lines in a newspaper, which could not have given a very full account of the transaction, or made a very deep or lasting impression upon his mind, or one that would preclude him from an impartial examination of the facts as presented during the trial."

From what has been said by this court in the cases cited, it appears that the opinion entertained by a juror which disqualifies him is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already. It is not because it will require some evidence to remove impres-

sions, or opinions formed from rumors, newspaper statements, or from whatever other sources these impressions may have been received, that a juror is disqualified. The sources of information are important in determining the effect likely to have been produced upon the mind of the juror, and the influence likely to be exerted upon his judgment; but the human mind is so constituted that impressions made upon it which lead towards certain conclusions, whether reached or not, will always require other impressions to be made to eradicate the former ones, or to lead towards different conclusions,—in other words, will require some evidence to remove them. We all are conscious that notions entertained by us are not all of the same stable character, and range all the way from conviction, which is the ultimate effect of ratiocination, to the passing comment or idle words that leave no permanent impression.

The question, therefore, must be always one of degree, and the trier is called upon to determine whether the opinion entertained by the juror is of that fixed or permanent character which disqualifies him from coming to the case in a fair, candid, and impartial frame of mind, which is unaffected with prejudice or favor to either party.

Each of the jurors challenged stated, under oath, that from what they had read in the newspapers, and talk in the neighborhood, and rumors, they had formed opinions which would require evidence to remove. One said it would take good evidence,—decided evidence. Two of them had formed their opinions from what they had read in the newspapers, purporting to be a confession made by the respondents, and that it would require evidence to change such opinions. It seems to me that the evidence shows that these jurors had such fixed opinions as disqualified them from sitting as jurors. The learned circuit judge thought otherwise, and overruled the challenges to the favor. They were in each instance challenged by the respondents peremptorily, and rejected. The question now is, Were the respondents prejudiced by the rulings of the court? It appears from the record that after the jury were finally impaneled and sworn, the respondents had twenty-two peremptory challenges remaining unused. It is not perceived how they were injured, or in any manner prejudiced, by being compelled to challenge these jurors peremptorily. If the law was that the respondent could exercise the right of peremptorily challenging jurors without limit, until he was satisfied with the jury, and the court should overrule his chal-

lenges for cause, and he should then reject the jurors peremptorily, no harm could possibly come to him by such erroneous ruling. Neither can it work harm where, in pursuing such course, his right of challenge is not exhausted before he secures a jury with whom he is satisfied to be tried. The point was directly ruled in *Sullings v. Shakespeare*, 46 Mich. 408; 41 Am. Rep. 166.

During the progress of the cause, and before a full panel had been secured, a juror had been accepted as one of the panel, and the court adjourned at the close of one day until nine o'clock the next day. Upon assembling at the appointed time, this juror did not appear. After a delay of nearly an hour, and search, he was found in a room of the hotel, playing pool. The court fined the juror ten dollars for contempt of court for not being present when the court opened, and excused him from the panel, and ordered him to step aside. His place was afterwards filled by another juror. The respondents excepted to that part of the judge's order which excused the juror from serving.

The circuit judge is invested with a certain degree of discretion in the selection of jurors for a panel. Such discretion is to be exercised in seeing that proper and competent men are selected; and so long as the case of the parties is not prejudiced by the exercise of such discretion, they cannot complain.

In the case of *Atlas Mining Co. v. Johnston*, 23 Mich. 36, neither party objected to the jury as finally obtained, yet the court set aside two jurors without any challenge, because from their examination they did not seem to be entirely impartial; and it was said that "it would be ground of error for the court to admit a juror who is challenged and ought to have been rejected. It is no ground of error to be more cautious and strict in securing an impartial jury than the law actually required; and that for this purpose the court may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause, or in other words, when the refusal to sustain the challenge would not constitute error."

In the case of *People v. Carrier*, 46 Mich. 442, a juror was excused by the judge for the reason that he was to be a witness in the next case to be tried, and this court said: "Before a juror has been sworn in the case, the judge may excuse him for any reason personal to the juror which seems to the judge sufficient."

In *Torrent v. Yager*, 52 Mich. 506, the judge excluded a juror against objection, and without challenge, because of his unfitness in consequence of the excessive use of intoxicating liquor while acting as a juror. This was held not to be error, the court saying: "It is the duty of the court to carefully guard and protect the rights of parties in the selection of jurymen, and see to it that no person who is incompetent is allowed to sit in the case."

In the case under consideration, the juror had exhibited such reckless disregard of his duty as a juror as to make it quite evident that he was unfit to serve upon the panel, and the judge was guilty of no impropriety in excluding him therefrom.

After the jury had been selected and sworn, and before any further proceedings were had in the case, it was ascertained that one of the members of the panel was an alien. The court thereupon ordered him to stand aside and be discharged from the panel, and that another juror be drawn in his stead; and that the respondents be allowed to challenge the remaining eleven, either for cause or peremptorily, if they desired to do so. The respondents excepted. Another juror was drawn and selected, and the jury were sworn, and the case proceeded. An alien is not qualified in any respect to sit upon a jury in this state. The jury, when sworn, consisted of only eleven jurors. The respondents were not in jeopardy until a jury of twelve men should be selected and sworn. The action of the circuit judge was correct, and supported both by reason and authority, many of which are cited in the brief furnished us by the counsel for the people.

Error is also assigned upon what transpired during the selection of the jury, with reference to investigating the truth of a rumor that one thousand dollars had been put into the bank at Paw Paw, with which to bribe the jury. The matter was fully probed, and turned out to be entirely without foundation; and while I do not approve the wisdom or propriety of the time and manner of the investigation, I do not see that the respondents could possibly be prejudiced in the minds of the jury by what transpired. It turned out to be a silly, idle rumor, without foundation, and without the semblance of testimony to support or give currency to it; and the result of the investigation was a complete vindication of the respondents from any charge of bribery, or attempted bribery, or corruption of jurors. Moreover, no exceptions were taken by the

respondents, and for that reason the errors are not properly assigned upon this record.

2. Dr. Josiah Andrews was a practicing physician and surgeon. He was present at the *post-mortem* examination of the body which had been found in Max Lake. He stated the examination which he made of the body, and described it as bloated considerably, and livid, purple, dark purple,—particularly the upper part of the body more than the lower part; made examination to ascertain cause of death, if he could do so, but did not make a very extended examination of the body, from the fact that it was very decomposed, very offensive, and even dangerous to work over; examined the lungs and heart in particular, found the lungs somewhat collapsed, not very much filled out with air. Both cavities of the heart were entirely empty of blood,—no blood in them,—nor in the first portion of the vessels,—the aorta and other large vessels. He described the appearance of other parts of the body, and the condition of the heart, and also the usual condition of the heart where death ensued from drowning. The prosecuting attorney asked the witness the following question: "Doctor, from the entire examination that you made of the heart, lungs, eyes, mouth, neck, and general appearance, together with the mutilation that you have testified to, did you come to any conclusion as to how death occurred,—by drowning or by other means?"

This was objected to as incompetent. The court permitted the question to be asked, and the defendant excepted. It is insisted that the witness had not made an examination which was sufficient to base an opinion upon. I think the witness had shown sufficient examination and knowledge to base an intelligent answer upon to the question. The witness answered: "Yes; my opinion was that the man did n't come to his death by drowning,—that he was dead before he was put into the water."

Counsel for respondent then moved to strike this answer out. This motion was properly overruled by the court.

Dr. Hatheway was a practicing physician and surgeon of thirty-three years' practice. He made an autopsy upon the body of a man found in Max Lake on August 1st. He examined the external appearance of the body, and laid off the scalp. He found no wound upon the body, except on the scrotum. A portion of that, particularly on the right side, hung like a fringe, and the left side was not so defined as a

fringe, but a cut over to the left,—a fringe of four or five pieces that hung, the skin from an inch to an inch and a quarter long. He made an incision with his knife to find the testicles; but there were none. The body was swollen—distended—very much. The face and neck were as black as an African's. He also made another examination on the following Tuesday, being the one testified to by the witness Dr. Andrews. Witness was then asked if, from the examination he made, he was able to come to any conclusion, or form any opinion as to whether death occurred from drowning. The respondents' counsel objected on the ground of incompetency. The witness stated that it was not a scientific opinion, and the question was then excluded by the court.

On the examination of witness, the following questions were asked by the prosecuting attorney, viz.:—

“Q. Now, Doctor, suppose there had been bruises, without breaking the skin, upon the chest, previous to death, and death occurred from strangulation,—I will say by a person putting their knees upon the stomach or chest,—would that have a tendency to hurry decomposition?”

“Q. Suppose that there had been bruises on the chest previous to death, and death had occurred from strangulation, what would you say as to whether decomposition would set in earlier than it would if there had been no bruises upon the chest?”

“Q. How quick?”

“Q. Well, now, then, after the decomposition had set in to the extent it had on this body at the time you made the examination, and death occurred by strangulation, without a fracture of the cartilage of the larynx, what would you say then about finding evidence of violence?”

“Q. Suppose that decomposition had set in as far as it had on this body at the time you made the examination, and providing death had occurred by strangulation, without fracture of the cartilage of the larynx, what would you say then as to finding evidence of violence?”

“Q. Suppose a person was killed, strangled, and thrown into the water, would the body rise sooner or later than it would in case of drowning?”

“Q. Suppose that death occurred from strangulation, and the eyes and tongue protruded, and the body thrown into the water, would the eyes and tongue remain in the same condition, or would they protrude farther?”

Error is assigned upon the overruling of the objection of the respondents' counsel to each of these questions. The record shows that question No. 1 was not allowed at all, and no ruling made upon it in that form. The objection to question numbered four was sustained. The fifth question was answered that "we couldn't tell; that is, presuming decomposition had gone to this extent." To the sixth question the witness answered: "It would depend wholly upon the condition,—it would depend wholly as to the length of time that had elapsed since death had taken place before it was thrown into the water." Whether the ruling was right or wrong as to the questions numbered five and six, the respondents were not prejudiced by the admission of the answers thereto. They proved nothing. The other questions were proper under the circumstances disclosed in the record. The homicide was claimed to have been committed on the twenty-eighth day of July, 1885, and the body of the murdered man was claimed to have been found in Max Lake on the first day of August, 1885, in an advanced state of decomposition. A question was made as to the identity of the body, and this testimony was offered to explain its condition,—the rapid rate of putrefaction; and also to show that life was extinct before the body was thrown into the lake. The testimony is not all returned; but it appears that the prosecution claimed that the homicide was committed by means of strangulation, and that there was evidence which tended to prove that theory. It was in this view of the case that the court permitted the questions above mentioned to be put, and we are not able to say that his rulings were erroneous.

Assignments of error from the thirty-second to thirty-ninth, inclusive, refer to the admissibility of testimony relative to a substance, supposed to be testicles, found upon a log about three hours after the body was found, which lay across the road leading through the woods from Bloomingdale to Max Lake. There was no error in the rulings of the court with respect to the admission of this testimony. The surgeons who examined it testified positively that it was the substance called "testicles"; but they could not swear that they were the testicles of a human being, and that they knew of no way of distinguishing the testicle of the human species from that of other animals by its anatomical structure. In connection with the evidence of the mutilated condition of the body found in the lake, the testimony was admissible.

3. The fortieth, forty-first, forty-sixth, and forty-seventh assignments of error relate to the testimony of Orange Cross. This witness was an inmate of the county jail in which respondents were confined after their arrest on the charge of murder, and was placed upon the witness-stand by the people, and testified that he was somewhat acquainted with the respondents; that he became acquainted with them in jail, and while there he had a conversation with Marshall G. Barker, he should judge about the 26th of August. He was then asked to state what conversation he had with him.

This question was objected to, because there were certain alleged confessions obtained from the respondents by detectives, under the authority of the county; and that any admissions or conversations following that detective work were not admissible, unless shown by the party offering them that they were obtained fairly, and without any fraud or undue influence, and that the influence which had been brought to bear upon the respondents, by which the confessions were obtained, had passed entirely out of their minds. The circuit judge then stated to counsel that there was no evidence before the jury at that time that the respondents ever confessed, or that any influences, improper or otherwise, were brought to bear upon them; and that respondents' counsel had the right to examine and find out whether anything of the kind was done, when it would be for the court to determine whether it would be admissible or not. Counsel for respondents suggested that it was the duty of the court to see that confessions were made voluntarily, and without improper influence; but the court replied: "I do not know, as a court, that any confessions were made at all. I have no evidence of it. There is no evidence before the court that any such confessions were made."

The prosecutor announced that he proposed, by the question asked, to prove an admission of the respondents; but whether it was obtained from detective work he could not say at that time. Thereupon the court said to respondents' counsel: "You may examine the witness as fully as you desire before he answers any questions, to see what influence, if any, surrounded the respondents at the time this man talked with them."

Exception was taken to this ruling.

Confessions voluntarily made, not induced by threats, or by a promise or hope of favor, are admissible in evidence in criminal cases. They are usually divided into three classes:

1. Confessions made in open court, under a plea of guilty, which are conclusive, and render any proof unnecessary; 2. The next highest kind are those made before a magistrate; and 3. Those made to any other person, which are the lowest grade, and require proof of corroborating circumstances to sustain them.

The presumption is, that confessions have been freely made until the contrary appears: 1 Chit. Crim. Law, *571; *Williams's Case*, 1 City H. Rec. 149; Roscoe's Crim. Ev. 43; *Commonwealth v. Culver*, 126 Mass. 464.

The practice to be pursued in the introduction of confessions in evidence has not always been uniform. In Phillips on Evidence, it is said: "For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made": 1 Phill. Ev. *551.

Mr. Chitty, in his work on criminal law, at page *572, says: "The practice, however, at present is for the prosecutor's counsel, on his examination of his own evidence in chief, to inquire of the witnesses all the facts, so as to satisfy the jury that the confession was voluntarily made and duly taken."

The question of the admissibility of the evidence is for the court, and not the jury, and is the subject of a preliminary inquiry: 1 Phill. Ev. *543; 1 Greenl. Ev., sec. 219.

Unless it appears from the testimony of the witness, or other evidence in the case, that the confession was not voluntary, or was made through the influence of fear or hope; or unless the evidence offered is objected to upon the ground that the confessions were made in consequence of fear, or of favors held out to the prisoners, — no preliminary examination into the facts and circumstances is called for. If, however, the contrary does appear, or the objection is made, then the preliminary examination must be had. In this case, when the evidence was offered by the people, it was objected to as being incompetent as having been made under influences which deprived it of the character of a free and voluntary confession. For all that appeared to the court at the time it was offered, it was *prima facie* competent. The respondents' counsel contended that it was incompetent by reason of certain extrinsic facts. It was for the respondents to establish those facts, and for the circuit judge to ascertain before admitting the evidence. We think the correct rule is laid down by the supreme court of Massachusetts, in the case of *Commonwealth*

v. *Culver*, 126 Mass. 464, where the point was directly passed upon, in which the court say: "It appears by the bill of exceptions that when the confessions of the defendants were offered in evidence, they objected to such confessions upon the ground 'that they were made in consequence of offers of favor made to the defendants by the officer who arrested the defendants, and had them in custody.' If this were true, and the defendants could establish the fact, the confessions were incompetent evidence. It was the duty of the presiding judge to determine that fact, upon hearing all competent evidence upon it which was tendered by either party. In the absence of all evidence, the presumption is that a confession is voluntary; and when the party confessing objects that confessions are not voluntary, he is called upon to show at least enough to rebut such presumption."

As the case stood, the burden of rebutting this presumption was upon the respondents, and the court did not err in so holding.

The respondents then examined the witness Cross, and also the prosecuting attorney and sheriff, whose testimony did not show that any confessions were obtained from respondents by means of threats, or by promises of favor, or by holding out to them the flattery of hope; but did show, conclusively, that artifice and deception were used to obtain a confession from respondents. This was accomplished through a detective agency of Chicago, by which a detective, by artifice and deception, personated and led respondents to believe that he was a lawyer of celebrity from Chicago; and in the confidence of that supposed relation obtained from them a statement of their connection with the crime.

Confidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice. Indeed, the confessions thus obtained, when offered in evidence, were promptly excluded by the court. The confessions sought to be introduced were statements to or in the hearing of other parties having no connection whatever with the pretended lawyer, and upon other and different occasions. There was no testimony showing what statements the detective made to respondents to induce them to confide in him, or to make any confessions to him, other than that of his being an attorney from Chicago, at the time the circuit judge decided to admit

the testimony of the witnesses relative to the alleged confessions.

We are of opinion that at the time the ruling was made by the circuit judge admitting the testimony of the witnesses Cross and De Puy, relative to the confessions made by respondents, such ruling was correct. Later in the case, communications written by one respondent to the other, and intercepted, or not delivered, were identified, and introduced in evidence; and from some of these it appeared that the detective who had assumed the role of the Chicago attorney had advised one of them to say that he committed the murder in self-defense, and the brother was called in afterwards to assist in secreting the body, and in that way he would clear them both, and especially the brother, who aided and abetted after the act. Had these facts appeared prior to the introduction of the evidence relative to the confessions, it would have been incumbent upon the prosecution to prove that the confessions offered were not the result of the influences exerted by the detective: Roscoe's Crim. Ev. 43; 2 Russ. Cr. 842; 1 Whart. Am. Crim. Law, sec. 694. And this might have been done by showing that the particulars of the crime, as stated to these witnesses, were different from those disclosed to the detective, and could not have been under the influence of his promises; for instead of making one brother accessory after the fact, the story of the killing, as narrated by these witnesses, made both of respondents principals in the transaction. In cases, however, where a subsequent confession is made, and it is claimed that it is subject to the objection that the party making it is under the influence of an inducement held out or exercised to obtain a previous confession, which for that reason is not admissible in evidence, the question whether such subsequent confession was the result of the same influence which induced the one previously made is one for the jury, under proper instructions from the court: *Commonwealth v. Cullen*, 111 Mass. 435; *Commonwealth v. Smith*, 119 Id. 305; *Commonwealth v. Piper*, 120 Id. 185; *State v. Potter*, 18 Conn. 166; *Sherrington's Case*, 2 Lew. C. C. 123; *Rex v. Cooper*, 5 Car. & P. 535; *Commonwealth v. Taylor*, 5 Cush. 605.

In *Commonwealth v. Piper*, *supra*, the court says: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements were shown; and the

finding of the court upon this question cannot be revised upon a bill of exceptions, unless it involves some ruling in matter of law, or the whole evidence is reported with a view of submitting its sufficiency to the appellate court. If the presiding judge is satisfied that there were such inducements, the confession is to be rejected; if he is not satisfied, the evidence is admitted. But if there is any conflict of testimony, or room for doubt, the court will submit this question to the jury, with instructions that if they are satisfied that there were such inducements, they shall disregard and reject the confession."

This seems to place the matter upon the proper foundation, and properly guards and protects the rights of the accused.

In this case, in an able charge which covered all the points in controversy in the case, and to which no exception was taken, the court instructed the jury upon the subject of the confessions as follows: "Testimony has been given before you in this case of certain alleged confessions and admissions claimed to have been made by respondents. It was the duty of the court to determine, in the first place, whether such alleged confessions were so far voluntary as to admit them in evidence for your consideration. The court did not, however, thereby determine them to be voluntary, and whether they were voluntary or not is a matter to be determined by you alone, without reference to their admission. If you find them to have been made voluntarily, you will consider them with all the other evidence in the case; but if you find that they were not voluntary, or if you find that they were made because of hopes held out to them, or because of fear, or because of inducements made to them to confess, you will reject them. Under such circumstances no reliance could be placed upon admissions of guilt, for the obvious reason that it could not be said that they were made because they were true, but because, whether true or false, the accused was led to believe it for his best interest to make them. And what I say upon this branch of the case I mean to apply also to the alleged written statements.

"I further say to you that the confessions of a prisoner out of court are a doubtful species of evidence, and should be acted upon with great caution, and unless they are supported by some other evidence tending to show that the prisoners committed the crime, they are rarely sufficient to warrant a conviction. The credit and weight to be given to confessions depend very much upon what the confessions are. If the

crime itself as charged is proved by other testimony, and it is also proved that the defendants were so situated that they had an opportunity to commit the crime, and their confessions are consistent with such proof and corroborative of it, and the witness who swears to the confession is apparently truthful, honest, and intelligent, then confessions so made might be entitled to weight. And you are also instructed that in criminal prosecutions the admissions of prisoners are received in evidence upon the same principle that admissions in civil suits are received; that is, upon the presumption that a prisoner will not voluntarily make an untrue statement against his own interest.

"I further charge you that where the verbal admissions of a person charged with crime are offered in evidence, the whole of the admissions must be taken together, as well that part which makes for him as that which may make against him, and if the part of the statement which is in favor of the respondent is not disproved, and is not apparently improbable or untrue, when considered with all the other evidence in the case, then such part of the statement is entitled to as much consideration from the jury as any other part of the statement. Alleged confessions and statements of these respondents were received simply and only as affecting the particular one alleged to have made them, and cannot be considered by you against the other."

Although we conceive it to be the province of the court to determine, in a case free from doubt, whether the confession is voluntary or not before admitting or rejecting the same as evidence, yet in this case we think he properly submitted that question to the jury, and the respondents do not complain of this instruction. The assignments of error based upon the rulings of the court relating thereto are overruled.

Objection was made to the introduction of certain exhibits which were admitted in evidence. These exhibits were written notes which the witness testified were handed to him by one of the respondents to be delivered to the other, and instead of delivering them, the witness handed them to the sheriff or to his wife. The witness identified the exhibits, and they were offered in evidence. The objection was, that the handwriting was not proven. The court ruled that "whether the handwriting be proved or not, is a question that is necessarily involved in the question as to whether these papers should be admitted in evidence. The witness states that he received

them from the parties, and that he handed them to Mrs. Todd. If he did so receive them, they are admissible in evidence; and whether he received them and handed them to Mrs. Todd is a question of fact for the jury; therefore they will be received."

There was no error in this ruling.

After the counsel for the people announced that the testimony for the prosecution was closed, the counsel for respondents then called one Matt W. Pinkerton, who, being sworn and examined on the part and in behalf of the respondents, testified that he resided in Chicago; that he had been in Paw Paw before; that he was there first on the 19th of August; that he had seen the respondents. And counsel for the respondents then asked the witness the following question:—

"Q. I want to ask you if you ever called the attention of Marshall G. Barker to section 9416 of the statutes of Michigan?

"A. I did; I think that was the section.

"Q. (showing book to witness). Just look at it. Counsel for respondents then stated: 'I offer this as explanatory of the notes.'

"Q. That was prior to bringing the subject to the attention of William Barker, was it?

"A. It was after, — after the first interview with him."

Counsel for respondents then read the section of the statute in evidence. The counsel for the people then proceeded to cross-examine the witness, and asked him:—

"Q. Did you have a conversation with Marshall G. Barker?

"A. I did.

"Q. In relation to Harvey Keith?"

The respondents' counsel then objected to any conversation as not cross-examination. It appearing that the conversation was at the same time (by the further examination of the witness), the court overruled the objection, and permitted the witness to be cross-examined, and to testify to the conversation had at that time. Upon this ruling error is assigned.

It is laid down by Mr. Phillips that "if a witness is sworn, and gives some evidence, — as, for instance, to prove an instrument, — however formal the proof may be, he is to be considered a witness for all purposes. Or if a witness is sworn, and would be competent to give evidence for the party calling him, the other party will be entitled, strictly, according to the general rule, to cross-examine him, although he has not been

examined in chief": 2 Phill. Ev. *898; *Morgan v. Brydges*, 2 Stark. 314; *Wentworth v. Crawford*, 11 Tex. 127; *Beal v. Nichols*, 2 Gray, 264.

In the last case cited, the witness was called by the defendant for the sole purpose of proving the execution of two written contracts which the plaintiff refused to admit. The witness was then cross-examined generally, against defendant's objection. Bigelow, J., said: "We see no valid objection for changing the rule, as it has long been established and practiced upon in this commonwealth, that a party calling a witness even for formal proof of a written instrument, or of other preliminary matter, thereby makes him his witness; nor can he put leading questions to him unless permitted to do so by the court in the exercise of a sound discretion. It follows that the adverse party has the right to cross-examine the witness upon all matters material to the issue."

Our own rulings upon the scope of cross-examination are familiar to the bar, and have been quite as liberal as those of the supreme court of Massachusetts: *People v. Hare*, 57 Mich. 505; *Thompson v. Richards*, 14 Id. 172; *Chandler v. Allison*, 10 Id. 461; *New York Iron Mine v. Negaunee Bank*, 39 Id. 658; *Driscoll v. People*, 47 Id. 413; *Jacobson v. Metzger*, 35 Id. 103; *Lichtenberg v. Mair*, 43 Id. 387; *Detroit etc. R. R. Co. v. Van Steinburg*, 17 Id. 99; *O'Donnell v. Segar*, 25 Id. 367; *Wilson v. Wagar*, 26 Id. 452; *Haynes v. Ledyard*, 33 Id. 319; *Stearns v. Vincent*, 50 Id. 221; 45 Am. Rep. 37; *People v. Murray*, 52 Mich. 288; *Joslin v. Grand Rapids Ice Co.*, 53 Id. 322; *Dalman v. Koning*, 54 Id. 320.

There was no error in permitting the cross-examination of the witness.

The exceptions are overruled, and the judgment is affirmed.

MORSE, J., in a dissenting opinion, quoted at some length in a note to *Heldt v. State*, 57 Am. Rep. 839, caustically reviewed the means employed to obtain a confession from the prisoners, and characterized their treatment after arrest, and before trial, by the prosecuting attorney and the sheriff, as "an outrage upon justice, for which there can be given no possible excuse, and the results of which, as intended, were used against them without right upon the trial of the cause." According to his statement of the facts, the prosecuting attorney, the sheriff, and a detective named Pinkerton, concerted to keep away all attorneys from the prisoners, and to introduce Pinkerton as a lawyer, get him employed by them, and as their pretended counsel, obtain a confession from them. The prosecuting attorney and the sheriff consequently kept a letter written by Marshall G. Barker to a firm of attorneys, and refused to allow one of the attorneys to interview the prisoners. They also kept all other counsel from the prisoners until informed by the circuit

judge that the Barkers were entitled to see attorneys of their own choice. The prosecuting attorney had a detective, one Stearns, arrested on a pretended charge of forgery, and placed in jail, where he could have access to the Barkers. Pinkerton was then introduced to the Barkers by the sheriff as A. S. Trude, a prominent lawyer of Chicago, employed to defend Stearns; and the sheriff advised the Barkers to employ Trude, which they did. Pinkerton, as their attorney, advised them what story each should tell in order to get Marshall off with a light sentence, and to acquit William altogether, and obtained a confession from each of them, in accordance with his theory, which he wrote down. The officials also employed another party in the jail, who took into his possession notes and letters from Marshall to William, from Marshall to his wife, and from William to Marshall, some of which referred to their supposed lawyer, and what he had advised them to do, and handed them to the sheriff's wife. The written confessions were ruled out on the trial, but the judge thought that the court below committed a grave error in admitting the notes and letters in possession of the sheriff's wife, for they had the effect, to some extent, of carrying out the conspiracy. The alleged confessions of the Barkers to the witness De Puy in the presence of the witness Cross, were made while the Barkers were under the influence and acting on the advice of Pinkerton, and should have been excluded. The court below committed a grave and substantial error in leaving it to the jury to determine whether the confessions were voluntary or not. As a matter of law, the confessions were not voluntary, and the court should have so decided. The court also erred in allowing the cross-examination of Pinkerton, and permitting him to disclose the confidential communications of the Barkers to him. Neither did the court do right to set aside a juror, upon its own motion, because he was a few minutes late, and had been playing pool; but as the prisoners' counsel announced themselves as content with the jury as selected, with challenges still remaining in their hands, it was an error without prejudice. In other respects, the judge agreed with the prevailing opinion.

OPINION, WHEN DISQUALIFIES JUROR: See *Smith v. Eames*, 36 Am. Dec. 521, and note discussing the question; *Armistead v. Commonwealth*, 37 Id. 633; *Freeman v. People*, 47 Id. 216; *Lohman v. People*, 49 Id. 340; *Commonwealth v. Webster*, 52 Id. 711; *Nelms v. State*, 53 Id. 94, and note; *Van Blaricum v. People*, 63 Id. 316; *State v. Thompson*, 74 Id. 342; *Monroe v. State*, 76 Id. 58; *Maddox v. State*, 79 Id. 307.

REJECTING AND EXCUSING JURORS BY COURT WITHOUT CHALLENGE. —
 1. *Discretionary Power.* — It is a recognized duty of trial courts to superintend the selection of juries, in order that they may be composed of proper persons: *Thompson and Merriam on Juries*, sec. 258. A large discretion is necessarily confided to the courts in the performance of this duty. It is therefore a well-settled rule that a court may, in its discretion, of its own motion, without the request or consent of either party, reject or excuse a juror before he has been accepted, because of his unfitness to serve, or for reasons personal to himself, and its action in so doing will not be reviewed, in the absence of a clear abuse of discretion: *Thompson and Merriam on Juries*, sec. 259; *Proffatt on Jury Trial*, sec. 140; 1 *Bishop's Crim. Proc.*, 3d ed., sec. 926; *Tatum v. Young*, 1 Port. 298; *State v. Marshall*, 8 Ala. 302; *Hurley v. State*, 29 Ark. 17, 22; *People v. Lee*, 17 Cal. 76; *People v. Arceo*, 32 Id. 40; *Stratton v. People*, 5 Col. 276, 279; *John v. State*, 16 Fla. 554; *Watson v. State*, 63 Ind. 548; *State v. Ostrander*, 18 Iowa, 435; *State v. Dickson*, 6 Kan. 209; *Stout v. Hyatt*, 13 Id. 232; *Atchison etc. R. R. v. Franklin*, 23 Id. 74; *State v.*

Kane, 32 La. Ann. 999; *State v. Somnier*, 33 Id. 237; *Ware v. Ware*, 8 Me. 42; *Snow v. Weeks*, 75 Id. 105; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *Head v. State*, 44 Miss. 731, 750; *Dodge v. People*, 4 Neb. 220; *State v. Kelly*, 1 Nev. 224; *Pierce v. State*, 13 N. H. 536; *State v. Benton*, 2 Dev. & B. 196, 221; *State v. Craton*, 6 Ired. 164; *State v. Jones*, 80 N. C. 415; *Jewell v. Commonwealth*, 22 Pa. St. 94; *Anderson v. Wasatch etc. R. R.*, 2 Utah, 518; *United States v. Cornell*, 2 Mason, 91, 106; *State v. Waggoner*, 2 South. Rep. 119 (La.); although in a few cases it has been held that if a court excuse a juror without good and sufficient cause, it is a matter of exception: *Montague v. Commonwealth*, 10 Gratt. 767; *Parsons v. State*, 22 Ala. 50; *Boles v. State*, 21 Miss. 398; so in *Den v. Pissant*, 1 N. J. L. 220, it is said that a juror has no right to challenge himself, and though a good cause of challenge exists, yet if neither party will take advantage of it, the court cannot reject him; and in Texas it is held that the law regulating the organization of juries in criminal cases does not confide to the trial judge a discretionary power to excuse a juror summoned on a special venire: *Hill v. State*, 10 Tex. App. 618; *Robles v. State*, 5 Id. 346; *Foster v. State*, 8 Id. 248. But according to the generally accepted view, the defendant in a criminal case is not prejudiced by the rejection of even a proper person, so long as an impartial jury was obtained: *State v. Marshall*, 8 Ala. 302; *Hurley v. State*, 29 Ark. 17, 22; *People v. Arceo*, 32 Cal. 40; *Stratton v. People*, 5 Col. 276, 279; *Stout v. Hyatt*, 13 Kan. 232; *State v. Benton*, 2 Dev. & B. 196, 221; and see *Allen v. State*, 8 Tex. App. 36; and a fortiori could neither party in a civil action complain: See *Tatum v. Young*, 1 Port. 298; *Atchison etc. R. R. v. Franklin*, 23 Kan. 74; *Atlas Mining Co. v. Johnston*, 23 Mich. 36. "Even if a juror had been set aside by the court for an insufficient cause," says Story, J., in *United States v. Cornell*, 2 Mason, 91, 106, "I do not know that it is matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions"; and said Sawyer, J., in *People v. Arceo*, *supra*: "A party is entitled to a lawful jury, but no decision has been brought to our notice to the effect that under all circumstances he is, as a matter of absolute right, entitled to have the first juror called who has all the statutory qualifications"; and in *Snow v. Weeks*, 75 Me. 105, the court in speaking of the power of a trial judge to exclude, in his discretion, a juror who is not legally disqualified, tersely remark: "He may put a legal juror off. He cannot allow an illegal juror to go on." On the same principle, the forbearance of the court to set aside, of its own motion, a juror against whom a cause of challenge exists, cannot be assigned for error: Thompson and Merriam on Jurors, sec. 259; *State v. Benton*, 2 Dev. & B. 196, 221; *Murphy v. State*, 37 Ala. 142; *Waller v. State*, 40 Id. 325; *Skinner v. State*, 53 Miss. 399; *Bellows v. Weeks*, 41 Vt. 590; *Young v. State*, 23 Ohio St. 577. In such a case, if a party would object to the juror, he should challenge him; and a failure to do so will be construed as a waiver of the juror's incompetency.

2. *Sufficient Reasons.* — a. *Conscientious Scruples* — *Having Formed Opinion* — *Bias.* — A sufficient reason for the exercise of this discretion of the court in rejecting jurors, of its own motion, is the possession by a juror of conscientious scruples against the infliction of capital punishment: Proffatt on Jury Trial, sec. 140; Thompson and Merriam on Jurors, sec. 259; *State v. Marshall*, 8 Ala. 302; *Waller v. State*, 40 Id. 325; *Russell v. State*, 53 Miss. 367; *Fortenberry v. State*, 55 Id. 403; *White v. State*, 52 Id. 216, 222; *State v. Ward*, 39 Vt. 225; *United States v. Cornell*, 2 Mason, 91, 104; *Mansell v. Queen*, 8 El. & B. 54; although the juror states, in answer to questions by counsel for the prisoner, that if he was on the jury, and the law required

him to convict, he would do so, notwithstanding the punishment might be capital: *Waller v. State*, *supra*.

The court may also of its own motion reject a juror who has formed, or formed and expressed, an opinion as to the guilt or innocence of the accused, or as to the merits of a case: *Lore v. State*, 4 Ala. 173, 174; *Watson v. State*, 63 Ind. 548; *Zimmerman v. State*, 56 Md. 536; *Marsh v. State*, 30 Miss. 627; *State v. Jones*, 80 N. C. 417; *Boardman v. Wood*, 3 Vt. 570, 578; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; although the opinion might not have been sufficient to have sustained a challenge: *Atlas Mining Co. v. Johnston*, *supra*. So jurors may be excluded, who have formed such an opinion of the unconstitutionality of a statute on which the prosecution is founded, that they cannot convict the defendant: *Commonwealth v. Austin*, 7 Gray, 51; *Pierce v. State*, 13 N. H. 536.

And the court may likewise, in its discretion, set aside a juror for partiality otherwise: Thompson and Merriam on Juries, sec. 259; *Smith v. State*, 55 Ala. 1; *State v. Williams*, 30 Me. 484; *Snow v. Weeks*, 75 Id. 105; *Commonwealth v. Livermore*, 4 Gray, 18; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; *contra*: *Montague v. Commonwealth*, 10 Gratt. 767; and it should be noticed that in some of these cases no legal objection could have been taken to the juror: See *Smith v. State*, 55 Ala. 1, 10, where it was said by Brickell, C. J., that "it is the duty of the court, when it shall appear satisfactorily that any person called as a juror has not the requisite qualifications of integrity, impartiality, or intelligence, at any time before he has been elected by the state and the defendant, to reject him." So the court may excuse a juror to "relieve him from embarrassment": *John v. State*, 16 Fla. 554.

b. *Sickness — Intoxication — Ignorance.* — A juror may be excused on account of sickness of himself: Thompson and Merriam on Juries, sec. 259; *State v. Ostrander*, 18 Iowa, 435; *Jewell v. Commonwealth*, 22 Pa. St. 94; or of his family: *State v. Ostrander*, *supra*; *King v. State*, 1 Mo. 717; but in the latter case it has been held by some authorities, contrary to the general principle, that the sickness must have been of such a serious character as to demand the juror's personal attention: *Parsons v. State*, 22 Ala. 50; *Boles v. State*, 21 Miss. 398; and deafness is an infirmity, for which, like ordinary sickness, a juror may be excused: *Jesse v. State*, 20 Ga. 156; *Atlas Mining Co. v. Johnston*, 23 Mich. 36.

If a juror is intoxicated, he may of course be set aside: Thompson and Merriam on Juries, sec. 259; Proffatt on Jury Trial, sec. 140; *Thomas v. State*, 27 Ga. 287; *Bullard v. Spoor*, 2 Cow. 430; *Pierce v. State*, 13 N. H. 536, 555; *Torrent v. Yager*, 52 Mich. 506.

The court may also excuse a juror for lack of intelligence: *State v. Roundtree*, 32 La. Ann. 1144; but in *Campbell v. State*, 48 Ga. 353, it was held that the court had no right to purge the panel of jurors, returned for service during the term, of such jurors as could neither write the English language nor read the constitutions of the United States and of the state of Georgia. If a juror does not understand the English language, he may be excused: Thompson and Merriam on Juries, sec. 259; Proffatt on Jury Trial, sec. 140; *People v. Arceo*, 32 Cal. 40; *Town of Trinidad v. Simpson*, 5 Col. 65, 71; *State v. Roseau*, 28 La. Ann. 579; *State v. Guidry*, 28 Id. 630; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *State v. Ring*, 29 Minn. 78; *Sutton v. Fox*, 55 Wis. 531; 42 Am. Rep. 744; *O'Neil v. Lake Superior Iron Co.*, 35 N. W. Rep. 162 (Mich.). Neither of the above grounds, however, may be causes of challenge: See *Town of Trinidad v. Simpson*, 5 Col. 65; *Gay v. Ardry*, 14 La. 228; *State*

v. *Push*, 23 La. Ann. 14; *State v. Gay*, 25 Id. 472; *Citizens' Bank v. Strauss*, 26 Id. 736; *State v. Lewis*, 28 Id. 84; *White v. State*, 52 Miss. 216, 224; *American L. Ins. Co. v. Mahone*, 56 Id. 180; *Commonwealth v. Winnemore*, 1 Brewst. 356; 2 Id. 378; *Lyles v. State*, 41 Tex. 172; *Etheridge v. State*, 8 Tex. App. 133.

c. *Miscellaneous*. — It is seen from the foregoing that the court is authorized, *ex mero motu*, in its discretion, to reject or excuse a person summoned as a juror, for reasons which may not be sufficient to support a challenge. But in *Boggs v. State*, 45 Ala. 30, it was held that the court could not reject a juror except for some of the causes given in the statute, and in the manner prescribed by law, without the consent of the accused; see also *Lyman v. State*, 45 Id. 72; *Montague v. Commonwealth*, 10 Gratt. 767. It was therefore held that on the trial of a felony it was error for the court, against the objection of the accused, to exclude a juror who had been regularly summoned and drawn, because since such juror was summoned and before he was drawn he had been convicted of an assault, and at the time of the trial was in the county jail. But the cases of *Boggs v. State* and *Lyman v. State*, *supra*, were overruled in *Smith v. State*, 55 Ala. 1, 10, the court saying: "The error of the decision in these cases lies in the supposition that there are no causes for the exclusion of jurors except such as are enumerated as challenges for cause in the statute."

It has been held that a juror may be excused because he was a witness in the next case on call: *People v. Carrier*, 46 Mich. 442; or because he is a postmaster: *Stewart v. State*, 1 Ohio St. 66; or because he belonged to a fire company in the city where the court was in session: *State v. Ward*, 39 Vt. 255; or where there is a probability that the juror was on the grand jury which found the indictment against the defendant, the juror not recollecting whether he was or not: *State v. Kelly*, 1 Nev. 224; and the court has discretionary power to excuse a juror, upon a statement by the defendant's counsel, after his challenges were exhausted, that they would impeach the character of a brother-in-law of the juror, who was a witness for the state: *State v. Christian*, 30 La. Ann. 367.

In the absence of any statement of the grounds on which jurors were excused by the court below, it will be presumed to have been done upon sufficient and legal cause: *State v. Breaux*, 32 La. Ann. 222.

If a juror is excused, he ceases to be a juror, and cannot be recalled: *State v. Whitman*, 14 Rich. 113.

DISCHARGE OF JURIES OR JURORS FOR INCAPACITY, UNFITNESS, OR IMPROPRIETY OF ACCEPTED JURORS. — It was at one time thought that, in criminal cases, a juror could not be withdrawn, or a jury discharged, when sworn, without giving a verdict: *Ferrar's Case*, T. Raym. 84; *Anonymous*, Fost. Cr. L. 27, 31; 3 Wharton's Am. Crim. Law, 6th ed., sec. 3130; but it is now well settled that a court has the power in such cases, where there is manifest or "legal" necessity: 3 Wharton's Am. Crim. Law, sec. 3130; Cooley's Const. Lim. *327; *United States v. Perez*, 9 Wheat. 579; *United States v. Coolidge*, 2 Gall. 364; *Mahala v. State*, 10 Yerg. 532; 31 Am. Dec. 591; and the accused may be again tried upon the same charge without such proceeding constituting any protection: Id.; although the unauthorized discharge of a juror, after the trial has been begun, will amount to an acquittal, and is available as a defense in another trial: *Ex parte Clements*, 50 Ala. 459. In civil cases, however, something more of a appellate court seems to be given the trial court; and it has been held that the appellate court will interfere with great reluctance with this discretion in excusing an accepted juror: *Grady v.*

Early, 18 Cal. 108. "Except under very peculiar circumstances, it is difficult to see how the erroneous exercise of a mere discretion in excusing a juror in a civil case could operate to the prejudice of a party": *Id.*, per Baldwin, J.

Our purpose is to inquire what incapacity, unfitness, or improper conduct by an accepted juror creates a "legal necessity," so that a court may withdraw the juror or discharge the jury.

1. *Objections Existing at Time of Juror's Acceptance.* — It will serve to reconcile cases falling under this head to note whether or not the objection to the juror was known to the parties at the time they accepted him; for if it was, it might well be held that they had waived the objection by neglecting to raise it; and also, in criminal cases, whether or not the objection was raised before the juror was sworn, or before evidence was given, or afterwards, and whether the state or the prisoner raised it; for in a criminal case it becomes a serious question for the state to raise an objection of incompetency after the jury is sworn, or at least after evidence is introduced.

Though there is no right of challenge after a juror is sworn, the court may nevertheless permit it: 1 Bishop's *Crim. Proc.*, 3d ed., sec. 947; *Regina v. Flint*, 3 Cox C. C. 66.

If a juror persistently refuses to be sworn, there would seem to be no doubt as to the power of the court to discharge him: *Isaac v. State*, 2 Head, 458. But it has been held that after a juror has been selected, but before he has been sworn in chief, the court has no power to discharge him because he had made different and contradictory statements, under oath, as to his qualifications, "thereby showing to the court that he did not know his own mind, or was willfully corrupt": *Lyman v. State*, 45 Ala. 72; but this case has been overruled: *Smith v. State*, 55 Id. 1, 10.

If an alien is discovered on the jury, after the jury is sworn and the trial commenced, he may be discharged, and another juror sworn in his place: 1 Bishop's *Crim. Law*, 7th ed., sec. 1039; 3 Wharton's *Am. Crim. Law*, 6th ed., sec. 3130; *Stone v. People*, 2 Scam. 326; and a juror may be set aside because he was not of age, after he has been accepted, but before he is sworn: *Hines v. State*, 8 Humph. 597. But it has been held that after the jury has been sworn, the court cannot discharge some of the jurors, on motion of the prosecuting officer, because they were not freeholders, as required by law; and having done so, the prisoner was entitled to be discharged: *Ward v. State*, 1 Humph. 253. If, after a jury is sworn, but before any evidence has been given, it transpires that the place of a juror duly examined and selected has been unauthorizedly taken by another without challenge or examination, the court should, on objection made, discharge the latter, and substitute the former, and have the jury resworn: *State v. Sternberg*, 59 Mo. 410.

If it appears for the first time after the jury has been sworn, whether evidence be given or not, that one of the jurors was on the grand jury which had found the indictment against the defendant, the court may, on motion or objection of the defendant, discharge the jury or discharge the juror and substitute another in his stead: *Dilworth v. Commonwealth*, 12 Gratt. 689; 65 Am. Dec. 264; *Steward v. State*, 15 Ohio St. 155; and see *Regina v. Sullivan*, 8 Ad. & E. 831.

A juror may be discharged after he is sworn, and before evidence is given, because it is discovered he is opposed to capital punishment: *People v. Damon*, 13 Wend. 351; *People v. Wilson*, 3 Park. Cr. 202; *State v. Diskin*, 34 La. Ann. 919; *Lewis v. State*, 17 Miss. 115; or because it is then ascertained that he will not convict on circumstantial evidence: *State v. Pritchard*, 16 Nev. 101; *People v. Bodine*, 1 Edm. Sel. Cas. 36, 44; and in such a case the court need not

discharge the eleven remaining jurors, but may impanel another juror in place of the one discharged: *State v. Pritchard*, *supra*. In an early Alabama case it was held, however, that where a juror was accepted, but had not been sworn, he could not be excused by the court because he was opposed to penitentiary punishment: *Stalls v. State*, 28 Ala. 25; but this decision is overruled: *Smith v. State*, 55 Id. 1, 7.

Where a juror was selected, but before he was sworn stated to the court "that he had formed and expressed an opinion," it was held error in the court to discharge the juror, because it did not appear that the opinion affected his competency; but that the prisoner having obstinately refused to say anything, when appealed to by the court, could not avail himself of the error after verdict: *Norfleet v. State*, 4 Sneed, 339; and where, during the progress of a murder trial, the prisoner's counsel stated to the court that they had been informed and believed that one of the jurors had before the trial expressed an opinion that the prisoner was guilty, and asked the court to suspend the trial and hear evidence upon the point, and the court heard evidence and found the disqualification to exist, and they thereupon offered to waive the disqualification and proceed, or go on with eleven jurors, but the court refused to do either, and discharged the jury, it was held that these facts did not bar a further prosecution of the prisoner: *State v. Allen*, 46 Conn. 531; but it was decided in *Van Blaricum v. State*, 16 Ill. 364, 63 Am. Dec. 316, that where a juror states, upon examination, that he had formed and expressed an opinion as to the guilt of the accused, but is accepted by the prisoner, and before he has been accepted or challenged by the people the court orders him to stand aside, it is erroneous, — a decision of questionable correctness. After a juror has been accepted in a civil case, he may be discharged on objection by one of the parties, because he stated "his mind was made up": *Grady v. Early*, 18 Cal. 108.

A juror, it has been also held, may be discharged on objection of the prosecuting attorney, after the jury is sworn, but before evidence is given, because of bias: *McGuire v. State*, 37 Miss. 369; and this was held proper, even after evidence given, in *United States v. Morris*, 1 Curt. 23; but this is an extreme case: See 1 Bishop on Criminal Law, 7th ed., sec. 1039. The court may undoubtedly order a mistrial after the jury is sworn, on the ground that a juror had fraudulently procured himself to be selected at the instance of the prisoner to secure an acquittal: *State v. Bell*, 81 N. C. 591. It has also been held that the court might, in its discretion, after a juror had been elected, discharge him on request of the prosecuting officer, because of his relationship to the defendant: *Boyd v. State*, 14 Lea, 161; and in a civil case, after the jury has been sworn, but before any evidence is given, the court may, on request of the plaintiff's attorney, discharge a juror, because related to the defendant, and direct another juror to be called and sworn in his place: *Thomas v. Leonard*, 4 Scam. 556. But during the trial of a criminal case the jury cannot be discharged because it is then discovered that one of the jurors is a relative of the prisoner: *Regina v. Wardle*, 1 Car. & M. 647; and where, after a jury had been impaneled and sworn, the complaint read to them, and the defendant pleaded to it, but before any evidence given, the court, at the instance of the solicitor, and against the objection of the defendant, discharged one of the jurors, because he was shown to be a witness in the case, this is unauthorized, and equivalent to acquittal: *Bell v. State*, 44 Ala. 393.

2. *Objections Arising after Juror's Acceptance.* — If a juror in a criminal case should die before verdict, the survivors must of course be discharged,

or perhaps another juror sworn, and the prisoner tried afresh: *Cooley's Const. Lim.* *327; 1 *Wharton's Am. Crim. Law*, 6th ed., sec. 588; *People v. Webb*, 38 Cal. 467, 480; or if one of the jurors should become insane: *Id.*; 3 *Wharton's Am. Crim. Law*, sec. 3130; *United States v. Haskell*, 4 Wash. C. C. 402; and the same rules would apply to civil cases. So if a juror becomes incapacitated through sickness: *Cooley's Const. Lim.* *327; 3 *Wharton's Am. Crim. Law*, sec. 3130; 1 *Bishop's Crim. Law*, 7th ed., sec. 1032; *Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Edwards*, 4 Taunt. 309; 3 Camp. 207; Russ. & R. C. C. 224; *Rex v. Barrett*, Jebb C. C. 103; *Rex v. Delany*, *Id.* 106; *Regina v. Beere*, 2 Moody & R. 472; *Regina v. Ashe*, 1 Cox C. C. 150; *Regina v. Newton*, 3 Car. & K. 85; *Ned v. State*, 7 Port. 187, 214; *McCauley v. State*, 26 Ala. 135, 144; *Mixon v. State*, 55 *Id.* 129; 37 Am. Rep. 695; *People v. Webb*, 38 Cal. 467, 480; *Hector v. State*, 2 Mo. 166; *State v. Baber*, 74 *Id.* 292; *State v. McKee*, 1 Bail. 651, 653; *State v. Curtis*, 5 Humph. 601; *Commonwealth v. Fells*, 9 Leigh, 613; *Foote v. Silsby*, 1 Blatchf. 445; *Commonwealth v. Merrill*, Thach. C. C. 1; *State v. Moncla*, 2 South. Rep. 814 (La.); and where two persons were tried for murder, and the jury had agreed as to one of them, it was held, a juror having been taken ill, that a verdict as to that one might be received, and the jury discharged as to the other prisoner: *Regina v. Leary*, 3 Craw. & D. 212; but it has been held that illness will not justify a discharge before verdict, if it can be removed by permitting the jurors to have refreshments: *Commonwealth v. Clue*, 3 Rawle, 498; and to justify a discharge, the juror's statement should be made under oath, or medical evidence heard: *Rulo v. State*, 19 Ind. 298. On the same principle, the court has the power to allow a juror selected by the parties to stand aside, because of his physical inability to sit: *Fletcher v. State*, 6 Humph. 249.

If, during a trial, a juror becomes too sick to proceed, the jury may be discharged, and the cause retried before another jury at the same or a subsequent term: 1 *Bishop's Crim. Proc.*, 3d ed., sec. 948; *Mixon v. State*, 55 Ala. 129; 37 Am. Rep. 695; *State v. Curtis*, 5 Humph. 601; *Pannell v. State*, 29 Ga. 681; *Commonwealth v. Merrill*, Thach. C. C. 1; Cal. Pen. Code, secs. 1123, 1139; Cal. Code Civ. Proc., sec. 615; or another juror may be added: 1 *Bishop's Crim. Proc.*, sec. 948; *Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Edwards*, 4 Taunt. 309; 3 Camp. 207; Russ. & R. C. C. 224; *Regina v. Beere*, 2 Moody & R. 472; *Regina v. Ashe*, 1 Cox C. C. 150; *Foote v. Silsby*, 1 Blatchf. 445; Cal. Pen. Code, sec. 1123; Cal. Code Civ. Proc., sec. 615; but see *Ellison v. State*, 12 Tex. App. 557; *Sterling v. State*, 15 *Id.* 249; or in civil cases in California, the trial may proceed with the remaining jurors: Code Civ. Proc., sec. 615; and in criminal cases in Texas, under the constitution and statutes, the trial may likewise proceed before the remaining jurors: *Ray v. State*, 4 Tex. App. 450; but if another juror be added, the prisoner should be offered his challenges, not only to the new juror, but to any and all of the original eleven, and the eleven should be sworn *de novo*, and the trial begin anew: 1 *Bishop's Crim. Proc.*, sec. 948; *Rex v. Edwards*, 4 Taunt. 309; 3 Camp. 207; Russ. & R. C. C. 224; *Regina v. Beere*, 2 Moody & R. 472; *People v. Stewart*, 64 Cal. 60.

If a juror becomes intoxicated after he is accepted, he may be discharged, and another one sworn in his place: *Jones's Case*, cited 2 Leach C. C. 620; *Nolan v. State*, 2 Head, 520; *State v. McKee*, 1 Bail. 651, 653; or the jury may also undoubtedly be discharged.

If a juror should escape or abscond before a verdict is reached, the jury of course would have to be discharged, or another juror sworn in, and proceedings again commenced: 1 *Bishop on Criminal Law*, 7th ed., sec. 1038; *Haw-*

com's Case, cited 2 Hale P. C. 295; *Regina v. Ward*, 10 Cox C. C. 573; *State v. Hall*, 9 N. J. L. 256; *Tooe v. Commonwealth*, 11 Leigh, 714; compare *Grable v. State*, 2 G. Greene, 559.

If the court finds that a juror has been tampered with during the trial, it may order him withdrawn: *State v. Bailey*, 65 N. C. 426; *State v. Wiseman*, 68 Id. 203; and the court may discharge a juror, who, after he was selected, but before he was sworn, had been observed by signs to indicate to a brother-in-law of the prisoner whom to reject or accept as jurors: *Lewis v. State*, 3 Head, 127.

ALIEN IS NOT COMPETENT TO SIT ON JURY: See *Reich v. State*, 21 Am. Rep. 265.

NUMBER OF JURORS CANNOT BE LESS THAN TWELVE: *Carpenter v. State*, 34 Am. Dec. 116; *Work v. State*, 59 Id. 671. Nor can a legal verdict be rendered in a criminal case by a jury of more than twelve: *Bullard v. State*, 19 Am. Rep. 30.

CONFESSIONS, WHEN ADMISSIBLE AS VOLUNTARY: See *Hendrickson v. People*, 61 Am. Dec. 721, and note; *Jones v. State*, 62 Id. 550, and note; *People v. Rogers*, 72 Id. 484, and note; *State v. Garvey*, 26 Am. Rep. 123; *State v. Revella*, 44 Id. 436; *Nolen v. State*, 46 Id. 247, and note; *Heldt v. State*, 57 Id. 835, and note quoting at length the dissenting opinion of Mason, J., in the principal case; and see *State v. Grear*, 41 Id. 296.

KENDRICK v. TOWLE.

[60 MICHIGAN, 303.]

ERROR CANNOT BE ASSIGNED FOR REFUSAL TO GIVE REQUEST TO CHARGE, where, although it was not given in the language used, it was given in substance.

INTEREST MAY BE ALLOWED ON AMOUNT OF DAMAGES awarded by the jury for property destroyed by the negligence of the defendant, from the time of its destruction, where it does not appear that anything more than actual compensation was awarded, unless the addition of interest would increase the damages to so great an extent as to be clearly unjust when the value of the property is taken into consideration.

ONE WHO OPERATES PRIVATE RAILROAD WITH LOCOMOTIVE-ENGINE TAKES UPON HIMSELF LARGE RESPONSIBILITIES to prevent loss by fire therefrom, and is required to use an amount of care and caution commensurate with and in proportion to the risks assumed.

OWNER OF SAW-MILL IS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, defeating his right to recover for loss by fire from the locomotive-engine of a private railroad which had been constructed after the mill was built, from the fact that he allowed combustible material to accumulate around the mill in near proximity to the railroad; but he had the right to use such material to fill up the waste and low places about the mill, just as he was accustomed to do before the railroad was built, and was not obliged to guard his premises to relieve the owner of the railroad from liability for his negligent acts.

CASE. The facts are stated in the opinion.

Mitchell and McGarry, for the appellant.

Wilson and Trowbridge, for the respondent.

By Court, SHERWOOD, J. The defendant was the owner and operator of a logging railroad, which extended from Wager's mill, a point on the Detroit, Lansing, and Northern railroad, in the county of Montcalm, some six miles back in the county, to a tract of pine timber. The road was the private property of the defendant, built under no charter from the state, and was run and operated as a private enterprise, and used principally for hauling logs. The cars were propelled by a locomotive-engine, formerly used on the Wabash railroad. It was a Mason standard gauge, and a wood-burner.

The engine, in passing over the defendant's road, passed within thirty or forty feet of a saw and shingle mill of the plaintiff. The mill had been built several years before the railroad was constructed, and had not been running for three or four months previous to the fifteenth day of September, 1883; but before the mill was shut down, some considerable quantities of sawdust, cull shingle, spalts, and saps, such as usually accumulate about such a mill, had not been removed, but laid about the mill, and extended nearly to the defendant's railroad track. On that day the sparks from the defendant's engine lodged in this combustible matter, not many feet from the mill, and set it on fire, from which the mill and machinery to the value of between two and three thousand dollars was completely destroyed.

The plaintiff brings this suit for his damages thus sustained, basing it upon the negligence of the defendant in allowing the fire to escape from the engine in such manner as to set the plaintiff's property on fire and destroy his buildings and machinery.

The plea was the general issue. The cause was tried at the Ionia circuit, before Judge Smith, with a jury, and the plaintiff recovered a judgment for the sum of \$2,115.

The defendant brings error. The record contains the substance of all the testimony and proceedings had in the case.

Nine of the twenty-three assignments of error raise the question as to whether there was a *prima facie* case of negligence alleged and proved against the defendant.

We think the declaration sufficiently states the plaintiff's case, and that the evidence of plaintiff made out a *prima facie* cause against the defendant, and do not deem it neces-

sary to go into a detail of the testimony in considering the question upon this point, but proceed to consider the other questions raised.

The second ground of error urged by defendant's counsel is that the court refused to strike out the evidence of plaintiff wherein he stated he did not consent to the defendant building his logging road.

We do not think either party was prejudiced by the rulings of the court upon this subject, or by the testimony, or by the rejection of that offered. It is not entirely clear that the testimony had any bearing in the case either way. In any event, it was so slight as to have done no harm. In so far as it was received, we are not prepared to say it was objectionable for the purpose offered: *Marquette, H., & O. R. R. Co. v. Spear*, 44 Mich. 172; 38 Am. Rep. 242. The ruling by the court refusing to allow defendant to show plaintiff did not object to the building of the road was entirely obviated, if erroneous, by subsequently allowing the defendant to make the proof he desired.

The defendant claims as his third ground of error that the court refused to give his sixth request to charge by stating to the jury that "negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it."

This definition was given by one of the ablest elementary law-writers of modern times, and has received the approval of this court: *Flint & P. M. R'y Co. v. Stark*, 38 Mich. 717; *Brown v. Congress & B. St. R'y Co.*, 49 Id. 153; and we see no good reason for withdrawing that approval.

The request of the defendant's counsel which the court omitted to give in the language requested was as follows: "Negligence is defined to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

While this request was not given in the language used, it was given in substance by the judge in the following paragraph, viz.: "In answering the question as to the plaintiff's negligence, the same as in answering the question of the defendant's negligence, involves an answer to the inquiry, What degree of care was required of him? He would be required to exercise reasonable care,—such care as a reasonable and

prudent man would exercise under like circumstances; and that would be greater care with the road there than without it. The degree of care required of him is to be measured by the surrounding circumstances, and the interests likely to be injuriously affected by the want of care are to be considered in determining the degree of care he should exercise. He should act as a reasonable, prudent, and careful man, in view of the surroundings; and in this connection, you must consider what was done and what was left undone."

We think the degree of care which the defendant was required to exercise is very well stated in the above charge of the learned circuit judge, and no error can be maintained under the defendant's third ground.

The defendant insists, as his fourth reason for reversal, that the jury allowed interest to be recovered on the amount awarded as damages from the time of the fire; and that the charge of the court permitted it. It does not appear that anything more than actual compensation was given by the jury for the property burned; and in such cases, unless the addition of interest would increase the damages to so great an extent as to be clearly unjust when the value of the property is taken into consideration, no reasonable objection can be made to the allowance of interest, and the objection in this case cannot be allowed to prevail: *Lucas v. Wattles*, 49 Mich. 383; *Hoyt v. Jeffers*, 30 Id. 192; *Winchester v. Craig*, 33 Id. 205; *Beals v. Guernsey*, 8 Johns. 446; 5 Am. Dec. 348; *Johnson v. Sumner*, 1 Met. 172; *Derby v. Gallup*, 5 Minn. 119; *Rhenke v. Clinton*, 2 Utah, 230; *Shepard v. Pratt*, 16 Kan. 209; *Sedgwick on Damages*, 7th ed., 189, note; *The Amalia*, 34 L. J., N. S. (Adm.), 21; *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361; *Mailler v. Express Propeller Line*, 61 Id. 312; *Chapman v. Chicago & N. W. R'y Co.*, 26 Wis. 295, 304; 7 Am. Rep. 81; *Sanoorn v. Webster*, 2 Minn. 277; *Railroad Co. v. Cobb*, 35 Ohio St. 94; *City of Chicago v. Allcock*, 86 Ill. 384; *Lincoln v. Claflin*, 7 Wall. 132, 139; *Old Colony R. R. v. Miller*, 125 Mass. 1; 28 Am. Rep. 194; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

The fifth ground of error, and which was much relied upon in the argument of defendant's counsel at the hearing, was the refusal of the court to instruct the jury as asked in his thirteenth request, which was as follows: "If the jury find that the plaintiff suffered and permitted spalts, saps, slits, cull shingle, shavings, sawdust, or other highly combustible material, which were made, created, or manufactured by the

operation of said mill, during the spring of 1883, to be and remain massed and scattered over the ground next to and adjoining said mill, or adjacent thereto, and to there remain till the time of the accident complained of, without removing the same, or taking any precaution to prevent the igniting of fire therein, and the spreading thereof to said mill; and that if such material had not been allowed to so remain, the destruction of said property might not have occurred in the manner complained of,—then I charge you that, as a matter of law, the plaintiff is guilty of contributory negligence, and, regardless of any other facts in this case, the plaintiff cannot recover.”

The consideration of this point involves a review of the whole case, and makes necessary some discussion of several matters not hereinbefore referred to.

It must be remembered that at the common law it was said: “If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me”: Roll. Abr., Action on the Case, B, tit. 5; Lord Duman, in *Filliter v. Phippard*, 11 Q. B. 347, 63 Eng. Com. L. 347; *Tubervil v. Stamp*, 1 Salk. 13. The rigorous rule of the common law has been somewhat modified by statutes, both in England and this country; and the grounds of liability are now held to be negligent acts of the party to be charged, or those of his servants. The defendant in this case holds no chartered immunity under legislative enactments. He had the right to build his railroad track, and conduct his business thereon by running trains within thirty or forty feet of the plaintiff's mill, propelled by a steam-engine. It was a lawful but hazardous business.

It is a matter of common knowledge that moving machinery propelled by steam is exceedingly dangerous, and liable to cause unintentional fires; and persons owning and operating them take upon themselves large responsibilities, and special precaution against injury to the property of others is required to be observed. The care and caution required of the owner must be commensurate with and in proportion to the risks assumed. Anything less than this must be regarded as negligence; and if injury ensue in consequence of such negligence, the owner will be liable: Wharton on Negligence, secs. 867 a, 868, 869; Shearman and Redfield on Negligence, 332, note; 2 Rorer on Railroads, 789; 1 Rorer on Railroads, 80; Cooley on Torts, 591; *Salmon v. Delaware, L., & W. R. R. Co.*, 38

N. J. L. 5; 20 Am. Rep. 356; *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733.

In this connection it may be observed that the defendant seems to have had full knowledge of the dangerous character of the engine; that it threw sparks badly, and had set several fires along the line of his road, and once to the refuse matter in the mill-yard, before the burning of plaintiff's mill; also that plaintiff had notified the defendant of the special danger at the mill-yard; and that defendant had told him he had a person to look after and protect the mill from taking fire from sparks from defendant's engine. These were all circumstances which imposed upon defendant additional care, and more than ordinary diligence, in guarding against injury at the mill.

The obligation of care to prevent the fire from the defendant's engine burning the plaintiff's mill rested upon the defendant; and the fact that old, combustible matter accumulated about the mill, and in near proximity to the railroad, cannot be urged as contributory negligence on the part of the plaintiff. He had a right to use the offal of his mill to fill up the waste and low places about it, just as he was accustomed to do before the railroad was built. He was not obliged to guard his premises to relieve the defendant from liability for his negligent acts: *Jones v. Mich. Cent. R. R. Co.*, 59 Mich. 437; *Alpern v. Churchill*, 53 Id. 607; *Underwood v. Waldron*, 33 Id. 237; *Grand Rapids & I. R. R. Co. v. Martin*, 41 Id. 667; *Newson v. New York Cent. R. R. Co.*, 29 N. Y. 390; *Fero v. Buffalo & S. L. R. R. Co.*, 22 Id. 209; 78 Am. Dec. 178; *Flynn v. San Francisco & S. J. R. R. Co.*, 40 Cal. 14; 6 Am. Rep. 595; *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 183; 21 Am. Rep. 97; *St. Joseph & D. C. R. R. Co. v. Chase*, 11 Kan. 47; *Salmon v. Delaware, L., & W. R. R. Co.*, 38 N. J. L. 5; 20 Am. Rep. 356; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Marquette, H., & O. R. R. Co. v. Spear*, 44 Mich. 169; 38 Am. Rep. 242; *Cooley on Torts*, 592, 593; *Hoyt v. Jeffers*, 30 Mich. 132; 1 Thompson on Negligence, 136, 165.

The circuit judge charged in substance that the jury might determine whether or not the plaintiff could allow the sawdust from his mill to lie on his own premises, and if so, for how long a time before the plaintiff, by his carelessness, could burn up his mill with impunity; that the plaintiff could not be careless with his own property, though upon his own premises and no one was injured thereby, and that the plaintiff

could not recover unless, in the management of his own premises, he observed all the care and prudence which reasonably careful and prudent men would under like circumstances; that they must take into consideration this combustible material on the plaintiff's premises,—the amount of it, where it was, how it was situated, the length of time it was left there, whether, after the road was built, it was negligent to allow it to remain there; were told that, "if he suffered and permitted this to a greater extent than a reasonably careful and prudent man would under like circumstances, he could not recover."

This was all erroneous. Whether he was careful and prudent was a matter of his own concern.

The circuit court also instructed the jury that the burden of proof was upon the plaintiff to show the negligence of the defendant, and his own freedom from negligence; and unless they were satisfied in both of these respects by the preponderance of evidence, their verdict must be for the defendant. There was really, upon the testimony, no question of contributory negligence in the case. If the request we have been considering had been proper, we think the circuit judge substantially gave it, and much more of the same character. We do not think the request should have been given, and much that was said by the court upon the subject was not warranted by the testimony; but inasmuch as the verdict was for the plaintiff, and the exceptional clauses were in favor of the defendant, neither side is injured by the charge.

We have been unable to find any error in the case prejudicial to the defendant, and the judgment must be affirmed.

RAILROAD COMPANY'S LIABILITY FOR INJURIES CAUSED BY FIRE FROM LOCOMOTIVES: See *Burroughs v. Housatonic R. R.*, 34 Am. Dec. 64, and note considering the question; *Hart v. Western R. R.*, 46 Id. 719; *Baltimore etc. R. R. v. Woodruff*, 59 Id. 72; *Sheldon v. Hudson River R. R.*, 67 Id. 155; *Hull v. Sacramento Valley R. R.*, 73 Id. 656; *Macon etc. R. R. v. McConnell*, 76 Id. 685; *Fero v. Buffalo etc. R. R.*, 78 Id. 178; *Bass v. Chicago etc. R. R.*, 81 Id. 254; *Ryan v. New York Central R. R.*, 91 Id. 49; *Lackawanna etc. R. R. v. Doak*, 91 Id. 166; *Frankfort etc. Turnpike Co. v. Philadelphia etc. R. R.*, 93 Id. 708; *Ohio etc. R. R. v. Shanefelt*, 95 Id. 504; *Perley v. Eastern R. R.*, 96 Id. 645; *Martin v. Western Union R. R.*, 99 Id. 189; *Pennsylvania R. R. v. Kerr*, 1 Am. Rep. 431; *Steinweg v. Erie R'y*, 3 Id. 673; *Bedell v. Long Island R. R.*, 4 Id. 688; *Toledo etc. R'y v. Pindar*, 5 Id. 57; *Flynn v. San Francisco etc. R. R.*, 6 Id. 595, and note; *Kesee v. Chicago etc. R. R.*, 6 Id. 643; *Gandy v. Chicago etc. R. R.*, 6 Id. 682; *Kellogg v. Chicago etc. R'y*, 7 Id. 69; *Jackson v. Chicago etc. R'y*, 7 Id. 120; *Webb v. Rome etc. R. R.*, 10 Id. 389; *Spaulding v. Chicago etc. R'y*, 11 Id. 550; *Fent v. Toledo etc. R'y*, 14 Id. 13; *Clemens v.*

Hannibal etc. R. R., 14 Id. 460; *Atchison etc. R. R. v. Stanford*, 15 Id. 362; *Burke v. Louisville etc. R. R.*, 19 Id. 618; *Salmon v. Delaware etc. R. R.*, 20 Id. 356; *Pennsylvania R. R. v. Hope*, 21 Id. 10; *Delaware etc. R. R. v. Salmon*, 23 Id. 214; *Rowell v. Railroad*, 24 Id. 59; *Louisville etc. R'y v. Richardson*, 32 Id. 94; *Marquette etc. R. R. v. Spear*, 38 Id. 242; *Richmond etc. R. R. v. Medley*, 40 Id. 734; *Simmonds v. New York etc. R. R.*, 52 Id. 587. As to the plaintiff's contributory negligence in permitting combustible matter to remain upon his premises, see particularly note to *Burroughs v. Housatonic R. R.*, 38 Am. Dec. 74; *Fero v. Buffalo etc. R. R.*, 78 Id. 178; *Ohio etc. R. R. v. Shanefelt*, 95 Id. 504; *Chicago etc. R. R. v. Simonson*, 5 Am. Rep. 155, and note; *Kesee v. Chicago etc. R. R.*, 6 Id. 643; *Kellogg v. Chicago etc. R'y*, 7 Id. 69; *Salmon v. Delaware etc. R. R.*, 20 Id. 356; *Philadelphia etc. R. R. v. Hendrickson*, 21 Id. 97; *Delaware etc. R. R. v. Salmon*, 23 Id. 214; *Murphy v. Chicago etc. R'y*, 30 Id. 721; note to *Louisville etc. R'y v. Richardson*, 32 Id. 98; *Richmond etc. R. R. v. Medley*, 40 Id. 734; *Pittsburgh etc. R'y v. Jones*, 44 Id. 334, and note; *Kalbfleisch v. Long Island R. R.*, 55 Id. 832; *Patton v. St. Louis etc. R'y*, 56 Id. 446.

GRIEB v. COLE.

[60 MICHIGAN, 397.]

WARRANTY TO WHICH ORDER FOR CHATTEL REFERS AND RESERVES FULL BENEFIT MUST BE OF SUCH LEGAL VALIDITY as to support an action thereon by the vendee in case of a breach thereof, to enable the vendor to maintain an action on the order.

WARRANTY IS NOT INVALID FOR INCOMPLETENESS, where the blanks in it for the date, name of the vendee, and subject-matter are not filled out, but it is printed on the back of an order for the chattel, which contains these terms, and which refers to the warranty, thereby constituting the order and warranty one instrument.

WARRANTOR IS BOUND BY PRINTED SIGNATURE, which he adopts as his, as fully as if it were in his handwriting.

ARTICLE DELIVERED MAY BE SHOWN NOT TO HAVE BEEN ARTICLE PURCHASED, under the general issue, in an action to recover the purchase price.

ORDER FOR MACHINE FROM DEALER IMPLIES THAT IT SHALL BE NEW, not second-hand, or the worse for wear; and the dealer cannot impose upon the purchaser a second-hand and worn machine, whether it complies with the terms of his warranty or not as to being good and well made, and that it will do as good work as any other machine of its class.

ASSUMPSIT. The facts are stated in the opinion.

George P. Voorheis, for the appellant.

Chadwick and Wood, for the plaintiff.

By Court, CHAMPLIN, J. On May 1, 1883, one W. D. McLaughlin, as agent for plaintiff, took from the defendant the following order:—

"GRATIOT, MICH., May 2, 1883.

"TO CHARLES GRIEB, Port Huron, Mich.: You will please ship me, on or about the first day of June, 1883, one Buckeye light mower, to Port Huron, for which I agree to pay you \$77, in manner as follows (reserving, however, the full benefit of the warranty hereon indorsed): \$35 cash, with freight from Port Huron, on delivery, and execute approved notes as follows: \$35, payable on the first day of January, 1884, with interest at seven per cent from delivery; \$42, payable on the first day of January, 1885, with interest at seven per cent from delivery; \$——, payable on the —— day of ——, 188——, with interest at seven per cent from delivery. For the purpose obtaining credit for the above, I certify that I own in my own name —— acres of land in the township of Gratiot, county of St. Clair, and state of Michigan, of which eighty acres are improved, and the whole worth, at a fair valuation, five thousand dollars over and above all encumbrances, liabilities, and legal exemptions. It is not encumbered, except one thousand dollars, and the title is perfect. I also own five hundred dollars' worth of personal property over and above all indebtedness, and not exempt from execution by law.

"P. O. address, Port Huron.

"Taken by W. D. McLaughlin, agent.

"CHAS. ^{ES} x ^{ES} COLE."
_{WRT.}

Across the back of which was printed a blank warranty, with Grieb's printed name appended, as follows:—

"Whereas, Mr. —— has this day given us his order for a ——; we hereby agree, in consideration of said order, and the faithful performance of the conditions herein mentioned, to warrant said —— one year to be good and well made, and to do as good work as any other machine of its class.

"It is an express condition of this warranty that the directions for using this machine shall be faithfully followed, and if for any reason it fails to perform as warranted, immediate notice of the same must be communicated to the agent to whom the order is given, and if said agent should fail to make the machine perform as warranted, it may be returned, and money or note refunded. And it is also agreed, should the machine be used from day to day, or at intervals, or set aside before or after use, without giving said agent notice, then, in either of said cases, it shall be conclusive evidence that the machine is accepted, and the warrant is at an end.

"Dated ——

CHARLES GRIEB."

The agent delivered this so-called order to the plaintiff, who claims that he accepted it, and delivered to the defendant the said machine on the eighteenth day of July, 1883, but the defendant has neither paid for said machine, nor executed and delivered the notes; and after the time expired when the note for thirty-five dollars, mentioned in the order, would have matured had it been executed, the plaintiff brought suit in justice's court to recover the amount claimed to be due at that time.

The plaintiff's declaration was in writing, and besides the common counts in *assumpsit*, contained a special count, and setting out the substance of the above order, and alleging a delivery of the machine ordered.

The plea was the general issue.

It is always proper, in construing a contract, to take into consideration the position which the parties occupied, and the circumstances under which the agreement was entered into.

The plaintiff resided at Port Huron, and was engaged in the business of supplying mowing-machines to farmers. He was not a manufacturer, but took written orders, and purchased the machines to fill such orders.

Defendant is a farmer, residing in the vicinity of Port Huron, and on the second day of May, 1883, signed the order above set out, and delivered it to plaintiff's agent.

On the trial the plaintiff offered in evidence the aforesaid order, and warranty thereon indorsed, to which the defendant objected, because not admissible under the declaration, and as immaterial to the issue. The objection was overruled, and this constitutes defendant's first assignment of error.

This objection is based upon the idea that the paper is incomplete; that the order refers to the warranty on the back, and reserves the full benefit of such warranty, and it appears that the blanks in the warranty were not filled out; and it is claimed, and I think rightly, that the warranty indorsed must be of such legal validity as to support an action thereon by Cole in case of a breach thereof.

By reference to the warranty indorsed, it will be observed that the name of Mr. Cole, and the description of the machine ordered, are omitted, as well as the date. If the warranty stood alone, there could be no doubt that it would be so far incomplete as to render it invalid, because thus standing it lacks the essential qualities of naming the party to be indemnified and the subject-matter. It does not appear from it whether *the machine is a steam-thrasher or a mowing-machine.*

But the reference in the order to the warranty indorsed thereon constituted the order and warranty one instrument, and when read together no ambiguity or uncertainty appears. The party to whom the warranty is made is the party making the order, and the machine is the machine described in the order, and the date of the order supplies the date to the warranty, for they are contemporaneous, and the warranty has the same force and effect as if embodied in the order itself.

The warrantor is bound by the printed signature, which he adopts as his as fully as if it was in his handwriting.

The order and warranty were properly admitted in evidence at that stage of the case.

The plaintiff gave evidence tending to show that he had complied with the contract on his part, and had delivered the machine at Port Huron within the terms and meaning of the contract, and also had requested defendant to execute the notes, and that defendant declined to accept such delivery, or to execute and deliver the notes. The fact of delivery was controverted by defendant.

The defendant also offered testimony tending to show that the mower which plaintiff claimed to have delivered to defendant was a second-hand machine, showing considerable wear; that the worn parts had been stripped and filled with paint in the wood-work, and parts of it had been painted over after having been used and worn; that the axles had old grease upon them, one set of knives were chipped and broken, and the tongue and neck-yoke considerably worn; that the entire machine had been used one season somewhat; but the court, on objection of plaintiff's counsel, excluded this evidence as not admissible under the plea, and not tending to show the condition of the machine when delivered. The latter portion of this ruling was based upon the fact that the witnesses by whom these facts were sought to be proved did not make the examination of the machine until after the trial in the justice's court, in April, 1884. The evidence, however, showed that on the 21st of July, 1883, which was three days after plaintiff claims to have sent the machine to defendant's farm and demanded the notes, defendant gave written notice to plaintiff that he refused to purchase it, and that it was there at plaintiff's risk, and to come and take it away; and the testimony was, that it had not been used since. There was therefore no reason for excluding the testimony on this ground.

The court erred also in excluding the evidence upon the

other ground stated. It was proper for the defendant, under the plea of the general issue, to prove that the article delivered was not the article he purchased. He did not order or purchase a second-hand mowing-machine, or one that had been in use and worn; but the order, taken in connection with the circumstances under which it was made, called for a new machine. A purchase of a machine from a dealer implies that the machine sold shall be new,—that is, not second-hand, or the worse for wear,—and under such an order the dealer could not impose upon the purchaser a second-hand and worn article, whether it complied with the terms of the warranty or not as to being good and well made, and will do as good work as any other machine of its class.

This evidence, if believed, fairly met and rebutted the plaintiff's case, and tended directly to sustain the defendant's plea, which put in issue each and every allegation of the plaintiff's declaration: *Rodman v. Guilford*, 112 Mass. 405.

The judgment must be reversed and a new trial ordered.

WARRANTY OF FITNESS FOR PARTICULAR PURPOSE IS IMPLIED, when an article is ordered from a manufacturer for a particular purpose: *Getty v. Rountree*, 54 Am. Dec. 138, and note; *Fisk v. Tank*, 73 Id. 737; note to *Bragg v. Morrill*, 24 Am. Rep. 104; *Harris v. Waite*, 31 Id. 694.

GODFREY v. WHITE.

[60 MICHIGAN, 443.]

COURTS OF EQUITY HAVE EXCLUSIVE JURISDICTION OF SUITS FOR PARTITION OF PERSONAL PROPERTY, even though the complainant's title is denied by the defendant.

REMEDY AT LAW IS EXCLUSIVE only when the rights of parties spring from legal duties and obligations; and even in those cases, if the legal remedy is inadequate to afford the proper relief, and property is wrongfully withheld to satisfy the just claims of parties, and beyond the reach of the law, equity may be successfully appealed to, and will furnish the necessary assistance in most cases to prevent a failure of justice.

ACCOUNTING IS PREREQUISITE TO SUIT FOR PARTITION OF PERSONAL PROPERTY only where a partnership relation exists between the parties as to the property sought to be partitioned, or there is some agreement, express or implied, between them that an accounting shall be had before such division.

BILL for partition of personal property. The facts are stated in the opinion.

John E. More, for the complainant.

Blair, Kingsley, and Kleinhans, for the defendant.

By Court, SHERWOOD, J. On the twenty-third day of April, 1877, the defendant and Amos Rathbone were the joint owners of thirty shares of the capital stock of the Continental Improvement Company, a corporation organized under the laws of the state of Pennsylvania.

The said Rathbone and the defendant owned equal interest in the stock, but it was all issued to defendant, and is still held by him, and stands in his name upon the books of the company.

Amos Rathbone died in 1882, leaving a will, which was probated in Kent County in December, 1882, and executors named in the will were duly appointed and qualified, and as such sold and duly transferred, for the consideration of \$775, the interest of said Rathbone's estate to the complainant, on the ninth day of July, 1883.

After this purchase the complainant applied to the defendant for a division of the stock, which was refused, and thereupon the complainant filed the bill in this case for the purpose of obtaining the division asked for, setting forth, among others, the foregoing facts.

The defendant appeared and answered, contenting himself with a simple denial of the facts set forth in the bill which would show him guilty of the injustice charged, and adding thereto the following averment, viz.: "And this defendant, further answering, says that, in regard to his dealings with the complainant in the stock of said corporation, he caused to be transferred, many years ago, all the stock he paid for either to this defendant or said corporation; that the certificate standing in his name was the individual property of this defendant; that the complainant never bargained for or paid any consideration for the same, or any part thereof, either to this defendant or to said corporation; and the defendant further avers whatever complainant's rights are they are subject to the equities existing between the defendant and the said Amos Rathbone's estate."

The cause was heard in the Kent circuit, before Judge Montgomery, upon pleadings and proofs, who rendered a decree granting the relief prayed.

We think the decree made was entirely proper in the case.

The testimony tends to show that for a series of years previous to April, 1877, the said Amos Rathbone and defendant did business together of all kinds, nearly; perhaps not as partners, but made joint purchases of land and other property,

holding the same either as joint tenants or tenants in common, taking the title to such property at the time of purchase, sometimes in the name of one and sometimes in the name of the other, and often in the name of both, but in all of which the interest of the parties was equal. In this manner, it seems, the property sought to be partitioned was purchased.

On the said 23d of April, 1877, a settlement was made between the parties, and all the property divided except the above-mentioned thirty shares of Continental Improvement stock, fifty-eight shares of the Grand Rapids and Indiana railroad stock, and twenty shares of Chicago and Michigan Lake Shore railroad stock.

These three items of property were not divided at the time of the settlement, and this statement appears in the agreement made between the parties at the time of the settlement in relation thereto: "There is certain property [meaning these three items of stock] which it is inconvenient at this time to divide; but it is hereby agreed between the parties hereto that said Rathbone and said White are the joint and equal owners thereof, and that the same shall be divided equally between them as soon as practicable."

In the division made each party took a portion of the assets as his share, and each assumed a portion of the liabilities of the parties, each guaranteeing the other against the payment of the portion he assumed. At the same time the following agreement was made: "Whereas, Amos Rathbone and George H. White have this day settled up their matters and divided their property, which they have held and owned together; and whereas, they have operated together for a number of years, and taken conveyances of land, sometimes in the name of said Rathbone and sometimes in the name of said White, and the same has been from time to time conveyed, sometimes with warranty, and the said Amos Rathbone and George H. White have been and are also executors of the estate of A. D. Rathbone, deceased, —

"Now, therefore, the said Amos Rathbone and the said George H. White, in consideration of the premises, each with the other agree that they shall mutually and equally pay and discharge all obligations and liabilities which may have or will hereafter grow or arise out of the aforesaid business and trust, other than those respectively aforesaid assumed by them in a certain contract of even date herewith, executed by the parties hereto."

The particular reasons why it was not convenient to make

division of the three items of stock at the time of the settlement does not appear in the record. It is therefore quite probable that it was immaterial to this issue. Neither does it appear that the defendant ever had any lien or claim to the estate's undivided half, nor that the stock was liable in any way to any claim made by the defendant.

The counsel for defendant depends in his brief upon four grounds: 1. That complainant's remedy is complete at law, and that equity has no jurisdiction; 2. That the contract under which complainant derives title, between Rathbone and White, is entire, and cannot be split up so as to allow the complainant, the assignee of Rathbone's rights, to call for a division of the Continental Improvement stock without the rest of the undivided stock being embraced in the division called for; 3. That White has a right to an accounting between the Amos Rathbone estate and himself, claiming that Rathbone has not paid the liabilities assumed by him in the contract of settlement; 4. That the contract to divide the stock is entire, and that White is not bound to perform his part until Rathbone has or is ready and willing to perform his, and that the former is not bound to divide any part of the stock until Rathbone or his executors are willing to divide the remainder.

Courts of equity have exclusive jurisdiction of suits for the partition of personal property: Freeman on Cotenancy, sec. 426; *Smith v. Smith*, 4 Rand. 102; *Conover v. Earl*, 26 Iowa, 167; *Marshall v. Crow's Adm'r*, 29 Ala. 278; *Irwin v. King*, 6 Ired. 219; *Crapster v. Griffith*, 2 Bland, 5; *Tinney v. Stebbins*, 28 Barb. 290; *Low v. Holmes*, 17 N. J. Eq. 148. This is true, even though the defendant denies the complainant's title: *Weeks v. Weeks*, 5 Ired. Eq. 118; 47 Am. Dec. 358; *Smith v. Dunn*, 27 Ala. 316; *Edwards v. Bennett*, 10 Ired. 363. We do not think the first point relied upon by defendant can be maintained. The demurrer claimed in the answer upon that ground does not appear to have been brought to a hearing at the circuit. This is not a case to enforce a contract for the sale and transfer of stock, neither is it a case to compel a company to transfer stock on its books to the name of the assignee or purchaser, but a bill to compel the performance of an equitable duty springing up and having its origin in the equitable relation of the parties to the property in question after the parties have acknowledged in writing the existence of such equitable relations.

It is only when the rights of parties spring from legal duties and legal obligations that the law steps in and furnishes the

remedy for their enforcement, to the exclusion of proceedings in equity; and even in those cases where the legal remedy is inadequate to afford the proper relief, and property is wrongfully withheld to satisfy the just claims of parties, and beyond the reach of the law, equity may be successfully appealed to, and will furnish the necessary assistance, in most cases, to prevent a failure of justice: *Low. Transf. Stocks*, secs. 223, 225.

The second and fourth grounds, above stated, upon which the defendant relies, furnish no defense in this case. They are not applicable to the facts stated, and so far as the interest of Rathbone and White in the three items of stock is concerned, it is substantially conceded; but whether it is or not, the record shows it was not a partnership one.

The thirty shares of Continental Improvement stock was an entire, distinct, and separate parcel of property, having no natural or necessary connection whatever with the stock in the other two railroad companies, and would, in any sale authorized in legal proceedings, ordinarily be required to be sold separate from the other two items of undivided property, and could as well be partitioned by itself as in connection with the other two parcels, and in fact, there might be very satisfactory reasons why a separate partition should be made.

No lien was created in favor of either of the parties as against the other under the relation in which they held the property, and none was created under the contract of settlement; and had there been any from any other source, it could not have affected the right of complainant to the partition asked, but only the extent of his interest in the property: *Low. Transf. Stocks*, secs. 138-141; *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218; *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466; *Hoyt v. Day*, 32 Ohio St. 101; *Earles v. Meaders*, 1 Baxt. 248.

The defendant's third ground of defense cannot be maintained. It is only when the partnership relation exists between the parties as to the property sought to be partitioned, or there is some agreement, express or implied, between them that an accounting shall be had before a division of the property can be made, that the rule contended for applies. The record fails to show the first, and the latter is not claimed. This necessarily disposes of the case, and the decree at the circuit must be affirmed, with costs.

SMITH v. PENINSULAR CAR WORKS.

[60 MICHIGAN, 501.]

PROPRIETORS OF LARGE MANUFACTURING ESTABLISHMENTS ARE BOUND TO FURNISH SUITABLE PLACE in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment in the business as usually carried on.

PROPRIETORS OF MANUFACTURING ESTABLISHMENTS SHOULD INFORM SERVANTS OF LATENT RISKS, which the servants from ignorance or inexperience are incapable of understanding and appreciating, or which they would not be likely to know, and of which the proprietors or their foremen are presumed to know and be familiar.

PROPRIETORS OF MANUFACTURING ESTABLISHMENTS WILL NOT DISCHARGE THEMSELVES FROM OBLIGATION TOWARDS SERVANTS, by informing the servants generally that the service engaged in is dangerous, especially where the servants are persons who neither by experience nor education have, or would be likely to have, any knowledge of such facts; but the servants should be informed, not only that the service is dangerous, and of the perils of a particular place, but where extraordinary risks are or may be encountered, if known to the masters, or should be known by them, the servants should be warned of these, their character and extent, so far as possible.

EMPLOYER IS NOT RESPONSIBLE TO SERVANT FOR INJURY RECEIVED IN EMPLOYMENT resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation; but where the danger to be avoided requires a knowledge of scientific facts, or is the result of well-known chemical combinations among well-educated men, if known to the employer, or should be known by him, the employer will be responsible to the servant for an injury resulting therefrom, if he neglects to notify the servant thereof.

NEGLIGENCE OR CARELESSNESS ON PART OF WORKMEN IN MANUFACTURING ESTABLISHMENT IS NOT SHOWN, so as to defeat an action brought by one of them against the employer for an injury received in the employment, from the fact that they whistled, sang, laughed, and talked while in the performance of their work.

SERVANT CANNOT BE CHARGED WITH CONTRIBUTORY NEGLIGENCE IN CASE OF INJURY RECEIVED IN EMPLOYMENT, or be said to have assumed all the risks and perils, ordinary and extraordinary, incident to the employment, in the absence of evidence showing the proper notice given by the agent in charge, or knowledge on the part of the servant.

CASE. The opinion states the facts.

Sumner Collins and Charles B. Lothrop, for the appellant.

C. A. Kent, for the respondent.

By Court, SHERWOOD, J. The plaintiff's intestate, Adelbert A. Smith, was her husband.

He was a laborer, and worked for the defendant during the year 1882, and until he died, in January, 1883. His business was principally that of a molder, and he worked in the

defendant's shop at Adrian. The work of molding and carrying molten iron was ordinarily done in two rooms, separate from each other, each being furnished with all appliances for melting iron and molding.

On the day in question, the fires had gone out in the room in which deceased was employed, and he was ordered by the foreman, who had entire charge of the men, to go with two others to get a ladle of iron from the other room, and bring it into the room where he was employed. To do this it was necessary to go out of doors, and into the open air. On this day, the ground over which it was necessary to pass was covered with ice, and water standing on the ice, making it very slippery, and there was no other way to get this iron.

On returning, and while passing over the ice, the man in the rear slipped down, and the molten iron was brought into contact with the water and ice, from which a violent explosion ensued, and deceased was, with one of the others, so injured that they died shortly afterwards, having made no statement of the manner and cause of the accident, and there was no eye-witness to the accident but the man who slipped down. The undisputed testimony was, that deceased was a good and careful man.

The suit is for damages arising out of Smith's death. The negligence charged against defendant is that the passage-way was not safe, and that Smith was not notified of the danger arising from the contact of molten iron with ice or water.

Plaintiff's claim is that this was not a proper and suitable place to perform deceased's labor, and that the danger of an explosion from contact of ice with molten iron was a latent danger, of which deceased was ignorant, and one not within the usual hazards of the employment, and that defendant was guilty of negligence in sending him to do work in such a place, and in not informing him of the danger of a passage over the icy way with the molten iron. The defense is, that the passage-way was safe; that its dangers were open, and were voluntarily assumed; that Smith was as likely to know as defendant's managers of the effect of the meeting of molten iron with water or ice; and lastly, that the proof shows that Smith's death resulted from his own carelessness, and that of Ray. When the plaintiff rested, the court below directed a verdict for defendant. There are several exceptions as to the rejection of testimony, but the main question is on the charge of the court directing the verdict.

When the case was heard, my impressions favored the ruling made by the judge of the superior court, but a careful examination of the record, and more thorough investigation of the case, has very essentially modified those impressions. Indeed, I think the facts and circumstances stated by the witnesses under the law applicable thereto required the case to go to the jury.

It has come to be very well settled that in large manufacturing institutions like that of the defendant the proprietors or masters are bound to furnish a suitable place in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment in the business as usually carried on: *Swoboda v. Ward*, 40 Mich. 423; *Huizega v. Cutler and Savidge Lumber Co.*, 51 Id. 272; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; 36 Am. Rep. 535; *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. St. 211; 40 Am. Rep. 634; *Cooley on Torts*, 553.

It is presumed that the master or foreman placed in charge of and conducting a manufacturing business knows and is familiar with the dangers, latent and patent, ordinarily accompanying that business; and if there are latent risks that a servant is, from ignorance or inexperience, not capable of understanding and appreciating, or which he would not be likely to know, the master should inform him of such dangers: *Wharton on Negligence*, sec. 209; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 584; 3 Am. Rep. 506; *Cooley on Torts*, 549; 2 *Thompson on Negligence*, 979; *Strahlendorf v. Rosenthal*, 30 Wis. 675; *O'Connor v. Adams*, 120 Mass. 427; *McGowan v. La Plata Mining Co.*, 3 McCrary, 397; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; *Hathaway v. Michigan Cent. R. R. Co.*, 51 Mich. 253; 47 Am. Rep. 569; *St. Louis & S. E. R'y Co. v. Valirius*, 56 Ind. 511; *Wood on Master and Servant*, sec. 349; *Michigan Cent. R. R. Co. v. Smithson*, 45 Mich. 212; *Chicago & N. W. R'y Co. v. Bayfield*, 37 Id. 205; *O'Connor v. Adams*, 120 Mass. 427.

I do not understand that the obligation of the defendant would be discharged by informing the servant generally that the service engaged in is dangerous; especially where the servant is a person who, neither by experience nor education, has, or would be likely to have, any knowledge of the perils

of the business, either latent or patent; but that, in such case, the servant should be informed, not only that the service is dangerous, and of the perils of a particular place, but where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible. It seems to me the value of human life, and the duty of the master in affording reasonable protection to persons while under his direction, cannot be held to require less than this: *Cooley on Torts*, 554; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596; 3 Am. Rep. 506; *East Saginaw City R'y Co. v. Bohn*, 27 Mich. 503; *Railroad Co. v. Fort*, 17 Wall. 553.

Of course, this rule would not require the employer to become responsible to the servant for any injury he might receive, while in the employment of the master, resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation. Such risks, and the danger therefrom, are always assumed by the servant when he engages in the service; but when the danger to be avoided requires a knowledge of scientific facts, or is the result of well-known chemical combinations among well-educated men, then I think the rule applies with much force, and cannot be ignored.

I do not think the court can presume that the common laborer in a foundry or machine-shop, such as this was, is possessed of the scientific knowledge necessary to enable him to comprehend and avoid any such danger as overtook Mr. Smith on that icy way, resulting in his death; and I think, before he was called upon to perform the hazardous undertaking by Mr. Hoban, the foreman in charge, he should have been informed somewhat of its dangerous character. This, however, was not done; and there is no pretense that the death of Mr. Smith was not caused by the explosion which followed the contact of the molten iron with the water and ice covering the dangerous passage over which the same was required to be carried.

And I think it may safely be said that, had Smith known of the dangerous character of the service arising from the accidental contact of the water and ice with the melted iron, he in all probability would have refused to perform the service required. I know it is said he passed over the icy track but a few moments before the accident occurred, and did so safely,

and must have observed the danger of falling. Conceding this, and that he was willing to take the risk of such danger, he certainly (if he did not know that the molten iron cast upon the water and ice would cause an explosion) could not have consented to take the risk of a fatal explosion. This was the danger he was subjected to in obeying the command of his employer, and of which he had no notice or knowledge, as is claimed by the plaintiff; and it is the neglect of the company, or its foreman, to notify the servant of such latent danger that she (plaintiff) makes the basis of her suit in this case.

The suggestion of the foreman to the men carrying the molten iron, that they worked or were going too fast, was no notice that if they allowed the water and ice to come in contact with the molten iron there would be danger of a terrific, and perhaps fatal, explosion. The testimony showed that Smith was a good workman and a careful hand. I do not think, because these men whistled and sang, "or were laughing and talking and full of fun," while in the performance of this work, this tended to show any negligence or carelessness on their part, but was rather indicative of the good nature and happy disposition of these servants. The law requires no such strained construction of the indications of the better feelings of our nature to excuse actionable negligence when accompanied with liability.

It is also suggested that it was as much the duty of Smith to have made the way safe over which the iron was carried as it was of any one. I do not so understand the law applicable to the facts contained in the record. Smith was under the direction of the foreman in all that he did; and the record does not show that he had any authority to clear this way of ice, or cover it with some other material. It was the duty of the foreman to know of its condition and safety before sending these parties over it. Smith had never carried molten iron over it before. It was not really the department in which he worked. It nowhere appears that the manner in which the iron was carried, or the neglect of any duty devolving upon Smith, was the occasion of his slipping upon the ice.

Was there any negligence shown, or was there any testimony reasonably tending to show, that the defendant was guilty of negligence in the matter?

It is true, if the plaintiff's intestate had knowledge of all

the facts, or had notice of all the facts, resulting in the fatal danger, before the accident occurred, then the plaintiff could not recover; but as I have before said, he cannot be presumed to have known them under the testimony in this case, and certainly the record does not show that the defendant ever gave him any information upon the subject.

I think it was the duty of the defendant, by its agent or foreman, to have informed Smith of the dangerous character of the service, and it was incumbent upon the defendant to show that Smith had knowledge or notice of such extraordinary danger, — a danger not liable to exist or be incurred in carrying on the work which he was engaged to perform in the usual place and in the usual manner; and if the agent in charge had not such knowledge, or was not qualified to give such information to the servant, the defendant was guilty of negligence in not furnishing a foreman with the proper qualifications for the position.

In the absence of testimony showing the proper notice given by the agent in charge, or knowledge on the part of the servant, it is difficult to perceive how Smith could be said to be guilty of contributory negligence, or how he could be said to have assumed all the risks and perils, ordinary and extraordinary, incident to the employment: *McGowan v. La Plata Mining Co.*, 3 McCrary, 397; *Kibele v. Philadelphia*, 105 Pa. St. 41; *Gilmore v. Northern Pacific R'y Co.*, 9 Saw. 558; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28; *Smith v. Oxford Iron Co.*, 42 N. J. L. 475; 36 Am. Rep. 535; *Wood on Master and Servant*, 749; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Fuller v. Jewett*, 80 N. Y. 46; 36 Am. Rep. 575; *Wright v. New York Central R. R. Co.*, 25 N. Y. 569; *Greene v. Minneapolis and St. L. R'y Co.*, 31 Minn. 248; 47 Am. Rep. 785; *Wabash R'y Co. v. McDaniels*, 107 U. S. 454; *Hough v. T. & P. R'y Co.*, 100 Id. 214; *Corcoran v. Holbrook*, 59 N. Y. 517; *Teipel v. Hilsendegen*, 44 Mich. 461; *Billings v. Breinig*, 45 Id. 71.

The facts from which contributory negligence are proper to be inferred ought to have been submitted to the jury, and there was testimony from which the jury might have found defendant guilty of negligence, and the court should have left both questions to the jury.

These views render the consideration of the other assignments of error unnecessary.

The judgment must be reversed and a new trial granted.

CAMPBELL, C. J., dissented, being of the opinion that the case did not present any ground of recovery. The only point of any legal importance was whether the defendant was responsible, at all events, for not seeing that there should be no ice on the path over which the decedent passed with the melted iron. The danger of explosion when melted metal comes in contact with water was the same that would exist anywhere, inside or outside of the building. It was one of those dangers incident to all foundries which all persons of any experience in such employment must be presumed to have sufficient understanding to avoid. But in this case the danger did not differ, except perhaps in degree, from other dangers which a slip or fall, when carrying melted metal over any slippery place, must almost inevitably bring about. The fact that risks may differ in extent, when all are of similar danger to personal security, cannot change the rule of diligence on either side. It could not be said that the foreman knew any better than the deceased that ice was liable to cause slipping, or that a slip on it with such a burden would probably be a serious matter. The risk was open to observation. Neither could it be supposed that it needed any special knowledge to discover it in broad daylight, or to expect its possibility in such weather. No workman was expected or bound, unless he pleased, to incur any serious danger without remonstrance, or any use of means to avoid it; and where any one deliberately chooses to go over a path which is as easily seen by him as it could be by any one else, he must be responsible for an accident arising out of its condition, unless there was such a positive duty in his employer to provide an absolutely safe path as to relieve him from any obligation to look where he was going. To require such extreme care on the one side, and to allow such blind reliance on the other, would introduce into the law rules which go beyond reason. The rule that a safe place of employment must be furnished was one which could not go so far without destroying all safety to employers themselves. It was a sensible and proper rule in cases where the place and its surroundings were not open to the knowledge of the persons employed, but it could have no application where every one had the same opportunity of judgment, and no peculiar knowledge or experience was involved. No rule could be a safe one which would render it unsafe for persons to employ others to aid them. The cases that generally come up arise where the employment is upon a considerable scale, and it is supposed the employer can afford to loose better than the person employed; but the principle, if correct, will apply as forcibly to domestic service and small industries as to any other.

MASTER'S DUTY TO WARN AND INSTRUCT SERVANT EMPLOYED IN DANGEROUS WORK. — It is a well-settled rule that a servant assumes the risks of the employment when he enters into it with a knowledge thereof: Note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 222; it is equally well settled that a master must use ordinary and reasonable care in protecting his servants from injury: *Id.*, 218; note to *Chicago etc. R. R. v. Swett*, 92 Id. 213; and it is also as completely established that a master is not liable for an injury, suffered by the servant in the course of his employment, from a defect in machinery, or other danger, unless the master knew, or ought to have known, thereof, and the servant did not know of it, or did not have equal means of knowledge: Note to *Buzzell v. Laconia Mfg. Co.*, 77 Id. 223, and cases cited; note to *Chicago etc. R. R. v. Swett*, 92 Id. 214; *Louisville etc. R. R. v. Allen*, 78 Ala. 494; *Colorado Central R. R. v. Ogden*, 3 Col. 499; *Central R. R. v. Kenney*, 58 Ga. 485; *Wonder v. Baltimore etc. R. R.*, 32 Md. 411, 417; *Elliott v. St. Louis etc. R. R.*, 67 Mo. 272; *Porter v. Hannibal etc. R. R.*, 71 Id.

66, 79; *Ryan v. Fowler*, 24 N. Y. 410; 82 Am. Dec. 315; *Faulkner v. Erie R'y*, 49 Barb. 324; *Loonam v. Brockway*, 28 How. Pr. 472; *Nelson v. Dubois*, 11 Daly, 127; *Mad River etc. R. R. v. Barber*, 5 Ohio St. 541; *Noyes v. Smith*, 28 Vt. 59; 65 Am. Dec. 222; *Wedgwood v. Chicago etc. R'y*, 41 Wis. 478, 482.

It is a plain deduction from these principles that it is the duty of a master to give such warning to the servant of all defects or hazards incident to the occupation of which the master knows, or ought to know, and such instruction as may be warranted by ignorance, inexperience, or want of capacity of the servant, and the dangerous nature of the employment: Wood on Master and Servant, sec. 349; 1 Shearman and Redfield on Negligence, 4th ed., sec. 203; 2 Thompson on Negligence, 979; Wharton on Negligence, sec. 209; Deering on Negligence, sec. 197; Cooley on Torts, 554; note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 223; *Fones v. Phillips*, 39 Ark. 17; 43 Am. Rep. 264; *St. Louis etc. R'y v. Valerius*, 56 Ind. 511; *Atlas Engine Works v. Randall*, 100 Id. 293; 50 Am. Rep. 798; *Louisville etc. R'y v. Frawley*, 110 Ind. 19; *Shanny v. Androscoggin Mills*, 66 Me. 420, 427; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *O'Connor v. Adams*, 120 Id. 427; *Wheeler v. Wason Mfg. Co.*, 135 Id. 294, 298; *Ryan v. Tarbox*, 135 Id. 207, 208; *Leary v. Boston etc. R. R.*, 139 Id. 580, 584; 52 Am. Rep. 733; *Atkins v. Merrick Thread Co.*, 142 Mass. 431; *Chicago etc. R'y v. Bayfield*, 37 Mich. 205, 212; *Swoboda v. Ward*, 40 Id. 420; *Parkhurst v. Johnson*, 50 Id. 70; 45 Am. Rep. 28; *Gibson v. Pacific R. R.*, 46 Mo. 163; 2 Am. Rep. 497; *Devitt v. Pacific R. R.*, 50 Mo. 302, 305; *Cummings v. Collins*, 61 Id. 520; *Porter v. Hannibal etc. R. R.*, 71 Mo. 66, 78; *Clowers v. Wabash etc. R. R.*, 21 Mo. App. 213; *Paulmier v. Erie R. R.*, 34 N. J. L. 151; *Missouri Pacific R'y v. Watts*, 64 Tex. 568; *Missouri Pacific R'y v. Callbreath*, 66 Id. 526; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *McGowan v. La Plata Min. etc. Co.*, 3 McCrary, 393 (a case bearing a close resemblance to the principal case); *Davies v. England*, 10 Jur., N. S., 1235; 33 L. J. Q. B. 321. This rule is especially applicable to the case where the servant is a minor: 2 Thompson on Negligence, 978; Wood on Master and Servant, sec. 350; *Grizzle v. Frost*, 3 Fost. & F. 622; *Fisk v. Central Pacific R. R.*, 72 Cal. 38; ante, p. 22; *Hill v. Gust*, 55 Ind. 45; *St. Louis etc. R'y v. Valerius*, 56 Id. 511; *Pittsburgh etc. R'y v. Adams*, 105 Id. 151, 165; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; 14 Cent. L. J. 92; *Hickey v. Taaffe*, 105 N. Y. 26; *Jones v. Florence Min. Co.*, 66 Wis. 268; 57 Am. Rep. 269; *Railroad Co. v. Fort*, 17 Wall. 553; yet if a child has obtained the requisite knowledge from any source, the master's personal neglect to give instruction will not render him liable: *Sullivan v. India Mfg. Co.*, 113 Mass. 396. The master's duty of giving notice, when such duty exists, is an absolute one, and is not performed by delegating it to a third person, who, though competent for that purpose, fails to give the proper information: *Wheeler v. Wason Mfg. Co.*, 135 Id. 294.

It will be observed that as a general rule the master is not required to explain patent dangers. Yet the youth, inexperience, ignorance, or want of capacity of the servant may require the master to warn the servant as to dangers which might be open to ordinary observation. Thus in *Jones v. Florence Min. Co.*, 66 Wis. 268, 277, 57 Am. Rep. 269, 272, it is said: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may

fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part. This rule does not in any manner conflict with the other well-established rule that the employee in any particular business assumes all the risks and hazards which are incident to such business, when the employee is of sufficient intelligence and knowledge to comprehend the dangers incident to his employment; and in the case of an adult person, in the absence of evidence showing the contrary, the presumption is, that the employee has sufficient intelligence to comprehend the dangers incident to his employment": See also *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Sullivan v. India Mfg. Co.*, 113 Mass. 396, 399; *Hill v. Gust*, 55 Ind. 45; *St. Louis etc. R'y v. Valerius*, 56 Id. 511; *Chicago etc. R'y v. Bayfield*, 37 Mich. 205, 212; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; 14 Cent. L. J. 92; *Fisk v. Central Pacific R. R.* 72 Cal. 38; *ante*, p. 22. The nature of the employment or the experience of the servant may be such that the master will have a right to assume that the servant knew the danger, without special warning or instruction: *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 307; *Michigan Central R. R. v. Smithson*, 45 Mich. 212; *Hathaway v. Michigan Central R. R.*, 51 Id. 253; 47 Am. Rep. 569. On the other hand, the person employed may be so young, inexperienced, and immature in judgment that no kind of warning and instruction would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work: *Pittsburgh etc. R'y v. Adams*, 105 Ind. 151, 166; *Hickey v. Taaffe*, 105 N. Y. 26, 36.

Not only is it a master's duty to warn the servant against latent defects and hazards incident to the service, of which the master knows, or ought to know, but a like duty rests upon the master where there is no danger in the work itself, but the peril grows out of extraneous causes: Wharton on Negligence, sec. 209; *Baxter v. Roberts*, 44 Cal. 187; 13 Am. Rep. 160; *Perry v. Marsh*, 25 Ala. 659. And where a servant is compelled by the master to do other work, extra hazardous, by which the servant loses his life, the master, knowing he was unskilled and unacquainted with the manner of doing the work, is liable: *Lalor v. Chicago etc. R. R.*, 52 Ill. 401; 4 Am. Rep. 616.

The duty of the master to give warning to the servant does not simply rest upon him at the inception of the employment. It is his duty to inform the servant of any increased danger from a change of machinery, or the introduction of new machinery, unless the servant has notice, or ought to take notice, thereof: *Hawkins v. Johnson*, 105 Ind. 29, 35; *O'Neil v. St. Louis etc. R'y*, 9 Fed. Rep. 337. So if a master knows, or under the circumstances ought to have known, that a machine in use was out of repair and dangerous, it is his duty to see that it is put in proper repair, or to warn those using it of the danger, if they were ignorant of it: *Rice v. King Philip Mills*, 144 Mass. 229, 237; 59 Am. Rep. 80, 82; and see *Shanny v. Androscooggin Mills*, 66 Me. 420, 427. So it is the duty of an employer who furnishes a new explosive for his servants' use to ascertain and make known its properties and the mode of using it: *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; 36 Am. Rep. 535; *Spelman v. Fisher Iron Co.*, 56 Barb. 151.

WAIT v. BALDWIN.

[60 MICHIGAN, 622.]

EVIDENCE OF AGREEMENT BETWEEN GRANTOR AND HUSBAND OF GRANTEE, by which the grantor released his claim to timber excepted by the deed, is inadmissible in an action of replevin by the grantor for the timber, and should not be submitted to the jury, where no agency of the husband was shown, and where the alleged settlement was made by the husband long after his wife had conveyed the land to strangers, and several years after he had separated from his wife.

TITLE TO TIMBER EXCEPTED IN DEED REMAINS IN GRANTOR, who has implied power to enter, fell, and take it away; and is of the same binding force and effect as if the whole estate had been granted, and then the grantee had reconveyed the timber to the grantor, in which case the grantor's right to enter upon the land, and cut and remove the timber at pleasure, would have passed as an incident of the grant, and could not have been revoked, unless coupled with a limitation as to the time of enjoyment.

GRANTOR'S RIGHT TO ENTER AND REMOVE TIMBER UNDER EXCEPTION CONTAINED IN DEED, without limitation as to the time of removal, does not rest upon the notion of a license from the grantee, but as being connected with the exception as an incident to its enjoyment, and is an interest in the land to that extent; and subsequent purchasers taking the title with full notice of the right are entitled to no protection against it as innocent purchasers.

REPLEVIN. The facts are stated in the opinion.

Black and Corcoran, for the appellant.

H. P. Atwood and T. W. Atwood, for the respondents.

By Court, CHAMPLIN, J. The plaintiff, on the 13th of March, 1883, brought replevin to recover possession of 1,276 felled cedar trees, 30 pieces of cedar, and 6 pine logs, cut from the north half of the northwest quarter of section 36, in township 12 north, range 10 east, Michigan.

He introduced in evidence on the trial a deed bearing date "the second day of July, in the year of our Lord," but not naming any year; the evidence, however, tended to show that it was delivered in the year 1870. This deed conveyed the land above described to Loretta M. Rumble, and immediately after the word "Michigan" contained the following words, "excepting timber therein." The evidence shows that there was at that time standing and growing on the land conveyed timber of the following varieties: pine, cedar, hemlock, black ash, and chestnut. Some four or five years after the date of the conveyance, plaintiff sold all the pine timber on the land to Stevens, Fowler, and Holland, who cut and removed the most thereof.

The defendant Baldwin acquired title to the land above described by a warranty deed from Mrs. Rumble to Mr. and Mrs. Poole, executed in May, 1871, and a warranty deed from them to him before he cut the timber in question.

There was testimony introduced upon the trial having a tendency to prove that the plaintiff, after the execution of the deed to Mrs. Rumble, who had then sold the land by warranty deed, in an interview with Mr. Rumble, who made the bargain for the purchase on behalf of his wife, agreed that he was to have five years in which to take the timber off; and that afterwards, some dispute having arisen with reference to plaintiff's right to the timber, there was an agreement made by which plaintiff's claim to the timber was fully settled and ended. Both of these transactions, if they occurred at all, transpired between Mr. Rumble and the plaintiff long after Mrs. Rumble had sold to the Pooles, and also several years after Rumble had separated from his wife, and they were living apart. Rumble had no interest whatever in the land or the timber, and no privity or connection whatever with the title or covenants of the deed to the Pooles. He was not authorized by his wife or any other person to make any arrangements with plaintiff with reference to the timber, or to settle his claim against the timber. What he did, by his own testimony, was as a mere stranger and volunteer, and his acts have never been ratified or sanctioned by Mrs. Rumble or any other person interested in such action.

His testimony concerning these transactions was admitted against the objection of plaintiff's counsel, and was submitted by the court to the jury, with instructions that from it they could find an agreement by which the plaintiff agreed that the timber should be removed in five years; and also that they could find that Mr. Rumble, for Mrs. Rumble, had a final settlement with plaintiff of his claim to the timber.

I think the court erred in receiving the testimony of Mr. Rumble upon these two points, and in submitting it to the jury. There was no agency proved, or attempted to be proved. There was no privity of contract established between Mrs. Rumble and plaintiff, and he was not bound by any such agreement or settlement as Rumble asserted was made, and which plaintiff denies was made.

This is not a case of a sale of land excepting therefrom the timber, which is to be removed within a certain specified time, or of the sale of timber to be removed within a fixed period;

in which cases it has been held that the limitation of time enters into the contract of sale, and the reservation or sale applies to such timber only as is removed within the time limited; and that no title is retained in the one case, or passes in the other, to any timber which remains upon the land after the time agreed upon for its removal has expired.

Here, in the deed granting the land, the timber thereon is excepted from the grant. The title to the timber remains in the plaintiff, who, by the transaction, has an implied power to enter, fell, and take away the timber: *Boults v. Mitchell*, 15 Pa. St. 371, 379; *Wood v. Leadbitter*, 13 Mees. & W. 844; *Thomas v. Sorrel*, Vaughan, 330, 351; *Hewitt v. Isham*, 7 Ex. 75; *Pierrepoint v. Barnard*, 6 N. Y. 279.

Plaintiff's title to the timber arising from the exception in the deed is of the same binding force and effect as if the whole estate had been granted by the deed, and then Mrs. Rumble had executed a deed to plaintiff of all the timber upon the land; in which case the plaintiff's right to enter upon the land, and cut and remove the timber at pleasure, would have passed as an incident of the grant, and could not have been revoked by Mrs. Rumble so as to defeat her grant to which the right was incident. It is essential to the enjoyment of the property, and as such enters into the property rights of the plaintiff in the timber by the assent of both parties. Such a right, where there are no words in the contract showing a limitation of the time of enjoyment, or within which it shall be exercised, is not revocable, nor can it be terminated at the will of the owner or grantee of the land, nor by notice to remove the timber in a reasonable time. The right to enter and remove the timber under the exception contained in this deed does not rest upon the notion of a license from the grantee, but as being connected with the exception as an incident to its enjoyment, and is an interest in the land itself to that extent.

This being so, the subsequent purchasers from Mrs. Rumble took the title with full notice of what appeared in the deeds forming the chain of title through which they claim, and are entitled to no protection as innocent purchasers. Plaintiff owned the timber and could maintain replevin for the trees when severed from the land without his permission or authority. No doubt the plaintiff could give a license by parol to defendants to sever the trees, and if he did so, and it was executed before it was revoked, it would be binding upon him:

Pierrepoint v. Barnard, 6 N. Y. 279. But the case was not defended or submitted to the jury upon this theory.

The judgment must be reversed, and a new trial granted.

CAMPBELL, C. J., and SHERWOOD, J., concurred in the result

EXEMPTION IN DEED OF TIMBER, EFFECT OF: See *Rick v. Seidersdorf*, 99 Am. Dec. 81, and note; *Alcott v. Lakin*, 66 Id. 739.

RIGGS v. STERLING.

[60 MICHIGAN, 643.]

CREDITOR'S RIGHT TO HAVE HIS DEBT SATISFIED BY SALE OF DEBTOR'S LAND NEVER EXISTED in this country or in England, except as given by statute.

HOMESTEAD EXEMPTION IS NOT IN DEROGATION OF COMMON LAW, but is rather the limitation and exclusion of that exemption. The rule requiring strict construction has therefore no application to homestead statutes, as against the debtor, or to the constitutional provision securing to him a homestead.

HOMESTEAD EXEMPTION STATUTES AND CONSTITUTIONAL PROVISIONS ARE CONSTRUED WITH FAVOR, liberally, and in accordance with their equity and spirit.

HOMESTEAD EXEMPTION, AS ESTABLISHED BY CONSTITUTION AND LAWS OF MICHIGAN, IS NOT ALONE FOR HUSBAND, and his protection, but for the benefit of the wife and children as well.

HOMESTEAD EXEMPTION IS NOT ONLY PRIVILEGE CONFERRED, but under the constitution of Michigan it is an absolute right; and was intended to secure against creditors a home, and to a certain extent the means of support, to every family in the state.

OCCUPANCY IS ITSELF EVIDENCE OF ELECTION AS HOMESTEAD, in Michigan, by the owner of the parcel occupied, and a notice to all of its homestead character, and of his selection, and the extent thereof, to enable him to enjoy the fullest protection of the law, where the land claimed as a homestead is within the quantity limited by the constitution, and is occupied by the owner.

HOMESTEAD, WITHIN CONSTITUTIONAL LIMIT AS TO QUANTITY, WHEN ONCE ESTABLISHED, in Michigan, by election, selection, and occupancy, is secure from the claims of creditors, unless it exceeds in value fifteen hundred dollars; in which event, if it is capable of division, the creditor may apply to a court of equity to have it divided, if the debtor will not consent thereto; but if in any case the homestead is incapable of division, it may be sold in the manner provided by statute, and the sum of fifteen hundred dollars shall be reserved and paid to the debtor with any excess after satisfying the execution.

EXCESS OF VALUE WILL NOT MAKE ANY OTHER ACTION ON PART OF DEBTOR NECESSARY, in Michigan, until after the appraisal provided for by statute has been made, where the debtor has selected his homestead, which is within the constitutional limit as to quantity; and in the absence of such appraisal, or a division had under the order or decree of a court of equity, no valid sale of the homestead so selected, or any part thereof, can be made by the sheriff.

HOMESTEAD, ONCE ESTABLISHED, CAN NEVER BE WAIVED, in Michigan, except by abandonment, or alienated, except by deed of some kind; but prior to an election and selection by the owner, it may be waived by failure to make such election and selection before sale by the sheriff.

WAIVER OF HOMESTEAD RIGHT BY HUSBAND CANNOT AFFECT WIFE'S INTEREST THEREIN; nor can the abandonment or waiver thereof by one entitled to its enjoyment affect the interest of any other person equally entitled thereto.

WIFE DOES NOT AFFECT HER HOMESTEAD RIGHT BY TAKING DEED OF HOMESTEAD from her husband without consideration, and such a conveyance cannot be considered in fraud of creditors.

PRICE OBTAINED FOR HOMESTEAD ON EXECUTION SALE IS NOT CONCLUSIVE as to its value in ejectment for the possession of the property under the sale.

COURT DOES NOT ABUSE ITS DISCRETION IN LIMITING NUMBER OF WITNESSES as to the value of the homestead to six on each side, where the only question in an action of ejectment for the possession of the property under an execution sale was as to the value.

STATEMENTS BY COUNSEL IN OPENING TO JURY, showing the bearing of facts admissible under the issue and expected to be proved, and how the issues are naturally affected by such facts, and illustrating the relation of the facts, and showing what must be the final outcome, however strong and forcibly presented, and however much calculated to appeal to the feelings, reason, or judgment, are proper; although statements in the opening to the jury, wholly inadmissible under the issue, or statements in the closing, admissible under the issue but not proved, are improper.

EJECTMENT. The facts are stated in the opinion.

S. E. Engle, for the appellant.

Sawyer and Knowlton, for the respondent.

By Court, **SHERWOOD, J.** The action in this case is ejectment, to recover the possession of less than forty acres of land situate in the county of Wayne, and not included in any town plat, city, or village. It was purchased by William Sterling, the husband of the defendant, in 1874, and was used and occupied by them, as their homestead, until the sixth day of March, 1883, when the husband died, and the defendant has made the same her home, continuing the occupancy thereof by herself and tenants, up to the time of commencing this suit.

The husband, desiring that his wife should have the property in case of his death, and he being in poor health, on the twenty-seventh day of January, 1880, conveyed the property by warranty deed to the defendant, and the deed was duly recorded on the seventh day of October, 1882.

In January, 1880, and after the making of the deed to the

defendant, the plaintiff recovered a judgment against the husband, William Sterling, upon a note several years past due, for about the sum of \$213. Execution was taken out upon this judgment, and the sheriff levied the same upon the premises, and subsequently advertised and sold the property to satisfy the execution.

The plaintiff became the purchaser upon the sale, at the sum of \$1,720, and paid the money to the sheriff, who satisfied the execution, and holds the remainder of the money, as he claims, for the defendant.

Neither the defendant in the execution, nor the defendant in this suit, had, at the time of the levy, any other real estate, or any other homestead, and they were using and occupying the premises as such homestead, and the fact of such occupancy by the defendant and her husband was known to both the plaintiff and the sheriff.

It further appears that neither the plaintiff nor the sheriff ever caused any appraisal of the property to be made. Mrs. Sterling, when informed of the levy, desired an appraisal to be made before the sale. It is under this sale plaintiff claims title.

After the time had expired for the sale to become absolute, the plaintiff instituted proceedings, under subdivision 3 of section 6706 of the Compiled Laws of 1871, to recover possession of the premises before a circuit court commissioner, and the case was appealed to the circuit court, where judgment was had for the defendant. The case was removed to this court, and the proceedings in the case were set aside on the ground that, in summary proceedings, the question of title to real estate cannot be litigated: *Riggs v. Sterling*, 51 Mich. 157.

This suit is now brought for the same purpose, the plaintiff relying solely upon his title derived under the said execution sale.

The plea in the case is the general issue, with notice that the premises were, at the time of the levy and sale, the defendant's homestead, and did not exceed fifteen hundred dollars in value. A trial of the case was had before Judge Chambers, by jury, and the defendant secured a judgment in her favor. The case is now before us for review on error.

The facts that the property in question was the home of the defendant, and that at the time of the levy and sale the defendant had one child, a minor, living with her, are not se-

iously questioned. Nor is it questioned but that the premises were within the quantity allowed to the defendant by the constitution for her homestead.

The levy made was for the debt of the husband. The defendant was neither legally nor equitably liable therefor; neither could the husband's interest in the premises be made liable for the debt if the value did not exceed the constitutional limits of a homestead while it was occupied by his family as such.

The learned counsel for the plaintiff seeks to sustain the levy and sale, which is made the basis of the plaintiff's title, and upon which he relies to maintain this suit, upon the following grounds, viz.: 1. That the homestead right is a personal privilege; that it may be taken or not at the option of the person or persons entitled to it; that the election to claim it, and the selection thereof, must be made by the owners or occupants of the property when it is sought to be subjected to the payment of their debts, and without such claim and selection, properly notified to the sheriff when he attempts to enforce collection of such indebtedness by levy and sale, the debtor loses the benefit of his privilege to occupy the property, or any part thereof, when its value exceeds fifteen hundred dollars, and that the defendant or husband, having failed to make such claim or selection in this case, cannot now be heard to make the same against the plaintiff, but must be content to receive the value of the exemption in money, though such value be the amount the plaintiff saw fit to pay for it on the sale made by the sheriff; 2. That by the neglect of the defendant or her husband to make the claim and selection, their homestead right in the premises was waived, and it is immaterial whether the premises contained the exempted quantity fixed by the constitution, or not; 3. That the wife, relying upon the deed of the property received from her husband as a protection against the plaintiff's execution, waived and forfeited her homestead right in the premises; 4. That the value of the claimed homestead was conclusively established by the amount it brought at the execution sale, and that subject cannot be litigated in this suit; that the amount bid at the sale is conclusive; 5. That the execution sale cannot be attacked in this suit, nor the plaintiff's title derived thereunder.

The individual or family home is one of the evidences of modern civilization. It is recognized among the earliest in-

stitutions of the common law. A man's dwelling-place, with his interest in the land lying about and contiguous to it, was always inalienable and indefeasible, except when required by the sovereign, or for the defense of the state; neither could the creditor, at the common law, sell any of his debtor's land to satisfy his debt; and such continued to be the law for centuries, and for a long time after the restrictions upon alienation had been substantially removed: 3 Bla. Com. 418.

The first encroachments upon the exclusive right of the debtor to the use of his land were as late as the statute Westminster 2 (13 Edw. I., c. 18), and not until the 1 & 2 Vict., c. 110, was the creditor permitted to make sale of his debtor's lands to satisfy his debt. The writs of *fieri facias* and *levari facias* only allowed the taking of the goods and profits of the debtor's land. The sheriff was not allowed to disturb the debtor's occupancy or possession of his lands, even under the writ *elegit*. The sheriff could not sell the land. He could only take possession of half the debtor's land, and could hold it no longer than the profits would amount to enough to satisfy the debt: 2 Inst. 395; 3 Bla. Com. 160; 1 Roll. Abr. 885.

It is true that on an extent under statutes merchant or statutes staple the debtor could be deprived of the use of all his land for his debt, but this could only be done when he had consented to the judgment (Fitz. Nat. Br. 131; 3 Bla. Com. 419), or lien under which the possession was taken. It is only in pursuance of statute law that the right of the creditor to have his debt satisfied by a sale of his debtor's land ever existed in this country or in England.

The homestead exemption in our state, and in this country generally, is therefore not in derogation of the common law, but it is rather the limitation and exclusion of that exemption which is not in accordance with the common law. It therefore follows that the rule requiring strict construction has no application to these statutes, as against the debtor, or to the constitutional provision securing the homestead to him, and it has no proper place in American jurisprudence upon the subject; and very few cases hold otherwise.

In a monarchical government, where it is not only policy, but absolutely necessary, to increase tenancies and dependencies, in order to maintain supremacy in the sovereign and give stability to the empire, I can readily see why the homestead exemption should not be permitted to exist; but in a government like ours, where a tenantry is unfavorable to freedom

and the independence of the people, where the ownership of the freehold is essential to the highest development of the citizen, secures the purest patriotism, and gives the best assurance of free government, its necessity and importance cannot be well overestimated.

It has been well said by distinguished jurists in our sister states "that the homestead exemption was founded upon principles of the soundest policy,—those looking to the general welfare, as well as to that of the individual citizen; and the obvious intent of the act is to secure to every householder or head of a family a home,—a place of residence,—which he may improve and make comfortable, and where the family may be sheltered and live beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot avoid": *Franklin v. Coffee*, 18 Tex. 415; *Wassell v. Tunnah*, 25 Ark. 103.

Indeed, the time has come when the right to homestead exemption in a reasonable amount ought to be regarded as appertaining to every citizen in every country existing under a republican form of government; and what seems most singular to the student who examines this subject at this late day is, that in this country the imperious demands of business, and the avarice and greed of wealth, should for so long a period have been allowed to so far control the legislation of the country as to completely obliterate the last vestige of the wise and humane provisions of the common law, and place not only the home but the homestead of every husband and family at the tender mercy of selfish, uncompromising, and it may be unpatriotic creditors.

It is not strange that courts whose duty it is to listen to the grievances of both debtor and creditor alike, and do justice to each, should not have failed to improve the first opportunity to look upon and construe with favor, liberally, in accordance with the equity and spirit of the law, the statutes and constitutional provisions by which the homes and homestead exemption are again restored to the citizen, after so many years of deprivation and destitution have been endured by the unfortunate in every community. Such has always been the construction given to these provisions of our constitution and laws upon the subject, and I trust a less liberal and humane view will never be taken by this court: *People v. Plumsted*, 2 Mich. 465; *Beecher v. Baldy*, 7 Id. 488; *Barber v. Rorabeck*, 36 Id. 399; *Bunker v. Paquette*, 37 Id. 79; *Lozo v. Sutherland*, 38

Id. 168; *Richardson v. Buswell*, 10 Met. 507; 43 Am. Dec. 450; *Montague v. Richardson*, 24 Conn. 338; 63 Am. Dec. 173; *Springer v. Lewis*, 22 Pa. St. 191; *Robinson v. Wiley*, 15 N. Y. 489; *Frost v. Shaw*, 3 Ohio St. 270; *Favers v. Glass*, 22 Ala. 621; 58 Am. Dec. 272; *Wade v. Jones*, 20 Mo. 75; 61 Am. Dec. 584; *Ferguson v. Miners' Bank*, 3 Sneed, 630; *Wilson v. Oldham*, 12 B. Mon. 57.

The homestead exemption, as established by the constitution and laws of this state, is not alone for the husband, and his protection, but for the benefit of the wife and children as well: Const., art. 16, secs. 2-4; How. Stat., c. 267; *People v. Plumsted*, 2 Mich. 471; *Beecher v. Baldy*, 7 Id. 488; *Dye v. Mann*, 10 Id. 297; *King v. Moore*, 10 Id. 538; *Snyder v. People*, 26 Id. 110; 12 Am. Rep. 302; *Comstock v. Comstock*, 27 Mich. 97; *Showers v. Robinson*, 43 Id. 502; *Sherrid v. Southwick*, 43 Id. 515; *Penniman v. Perce*, 9 Id. 509; *Dyson v. Sheley*, 11 Id. 527.

The homestead exemption as it now exists is not only a privilege conferred (*Chamberlain v. Lyell*, 3 Mich. 458), but under the constitution it is an absolute right. "It was intended to secure against creditors a home, and to a certain extent the means of support to every family in the state": *Dye v. Mann*, 10 Id. 297; *McKee v. Wilcox*, 11 Id. 358; 83 Am. Dec. 743.

The homestead right exists in favor of the poor and the rich alike. It is for the support of the one, and security against want and destitution for the other; and when the homestead claimed to be protected is within the quantity limited by the constitution, and occupied by the owner, such occupancy is itself evidence of an election by the owner of the parcel occupied, and a notice to all of its true character as a homestead, and of his selection, and the extent thereof, and no other or further notice is necessary to be given to enjoy the fullest protection of the law: *Beecher v. Baldy*, 7 Mich. 488; *Thomas v. Dodge*, 8 Id. 51.

When such homestead, in amount within the constitutional limit, is once established by such election, selection, and occupancy, the constitution is a positive prohibition against levy and sale by the owner's creditors, unless it exceeds fifteen hundred dollars in value: *Beecher v. Baldy*, *supra*; *Drake v. Kinsell*, 38 Mich. 232.

If the creditor, however, thinks the homestead thus selected by the debtor exceeds in value the sum of fifteen hundred dol-

lars, and it is capable of division so as to leave the debtor a homestead worth that amount, he may then apply to a court of equity, and have the division made, if he cannot obtain the consent of the debtor to a division: See *Beecher v. Baldy*, *supra*.

If, however, in such case, or in any other case, the homestead is incapable of division, then the sheriff may proceed under the statute; and under proper notice to the defendant, and under proper proceedings taken, have the homestead appraised, and if found incapable of division, and the value exceeds fifteen hundred dollars, the whole property may be sold, unless the debtor shall pay the judgment, and in case of sale, fifteen hundred dollars shall be reserved for the debtor, and which, with any excess after satisfying the execution, shall be paid over to him: How. Stat., sec. 7728.

From the foregoing, it will be seen in no case where the debtor occupies the homestead, and it is within the constitutional limit, and is capable of division, whatever may be its value, is he required to take any steps to preserve or protect his homestead against the invasion of the creditor under his levy and sale on his execution, before he seeks, by suit in the circuit court, to have division made, or to obtain possession after levy and sale, as in this case: See How. Stat., c. 267.

It will be further noticed by an examination of the provisions of the constitution and statute, and the decisions herein cited, that the defendant in the execution is only bound to take the initiative in preserving and protecting his homestead right after levy, when the parcel of land occupied exceeds in quantity the legal limit, and no election or selection of the homestead has been made by the debtor; that when the selection has been made, and it is within such limit as to quantity, excess of value will not make any other action on the part of the debtor necessary until after the appraisal is made; and without such appraisal made, or a division had under the order or decree of a court of equity, no valid sale of the homestead, or any part thereof so selected by the debtor, can be made by the sheriff.

The homestead, once established, can never be waived except by abandonment, or alienated except by deed of some kind: *Showers v. Robinson*, 43 Mich. 512; *Wallace v. Harris*, 32 Id. 380; *Amphlett v. Hibbard*, 29 Id. 298.

The homestead right, however, before the owner has made his election and selection in the manner hereinbefore set forth, may, all parties interested therein having knowledge of the

facts, be waived by failing to make such election and selection before sale by the sheriff: *Beecher v. Baldy*, 7 Mich. 505; *Stevenson v. Jackson*, 40 Id. 702; *Lamore v. Frisbie*, 42 Id. 189; *Matson v. Melchor*, 42 Id. 477; or the homestead may itself be entirely lost by abandonment by all the parties (if no minors) interested therein or to be affected thereby: *Wisner v. Farnham*, 2 Id. 472; *Phillips v. Stauch*, 20 Id. 369; *Bunker v. Paquette*, 37 Id. 79; *Bissell v. Taylor*, 41 Id. 702; *Dei v. Habel*, 41 Id. 88.

No waiver of the homestead right by the husband can affect a wife's interest therein: *Beecher v. Baldy*, 7 Mich. 506; *Williams v. Starr*, 5 Wis. 534; *Ring v. Burt*, 17 Mich. 465; 97 Am. Dec. 200; *First Nat. Bank of Constantine v. Jacobs*, 50 Mich. 340; neither can the abandonment or waiver of the homestead right or homestead by one entitled to enjoy the same affect the interest of any other equally entitled thereto: *Showers v. Robinson*, 43 Id. 513; *Griffin v. Johnson*, 37 Id. 87, 92; *Allen v. Shields*, 72 N. C. 504.

The defendant, in taking her deed of the fee of this homestead, without consideration, of her husband, did not affect her homestead right. It cannot be considered in fraud of creditors: *Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Id. 244; *Pulte v. Geller*, 47 Id. 560; *O'Connor v. Boylan*, 49 Id. 210. She waived nothing by so doing: *Anderson v. Odell*, 51 Id. 492; *Vermont Savings Bank v. Elliott*, 53 Id. 256. The law as above stated has been applied in a great many cases, and has in many instances been found necessary in this state to secure the benefits intended to our people under the constitutional and statutory provisions.

We think their necessity is quite apparent in the present case, though the facts are but meagerly presented in the record.

It appears that defendant's husband was living until after the equity of redemption on the sale of her property made by the sheriff had expired, and until after efforts were made by the plaintiff to obtain possession of the premises; that for ten years, at least, this homestead had been the defendant's only property; that the husband had been sick for a number of years; that he was nearly eighty years of age, and so infirm as not to be able to work, and that the defendant, who was well advanced in life, was obliged to carry on the little farm, and do much of the work in the field herself to secure a living for herself and husband; that while thus situated, the plaintiff

undertook to enforce the collection of his debt out of this homestead, under a levy and sale thereof, and this is thus far his second suit which has reached this court in his effort to deprive the defendant of her home to satisfy his claim.

Should the contest be waged against her much longer, even though she succeeds in the end, but little will be left to her for future support. Especially must this be so if but an excess of but about two hundred dollars could be realized upon the sale of the property, and even that amount was only obtained on the plaintiff's own bid.

This price, obtained at a public sale of the property, is claimed by the plaintiff's counsel to be the best evidence of its actual value. This may or may not be so, according to circumstances. Many times the homestead property might be sold for a sum far exceeding its actual value. For instance, suppose a neighbor adjoining desired the parcel for a building lot to accompany his farm; under such circumstances, he might be induced to pay largely in excess of its market or actual value for it. Or suppose the occupants were troublesome and annoying to the neighbor, and he wished to get rid of them, as is not unfrequently the case; or take a case where the creditor, to gratify his feelings against his debtor for not making payment, should see fit to run up the property upon the sale to an unreasonable amount,—could it be truthfully said that the sum obtained under such circumstances would represent the actual or market value of the property, or would be the best or even good evidence of what it actually was? Would it be the value the framers of the constitution meant when they said the homestead should be limited to fifteen hundred dollars? I think not. A sale made under such circumstances would only be a mode of circumventing the object intended by the constitution when the provision was sought to be applied to the precise case which brought the law into existence. Yet this sale is claimed to be conclusive; and that in ejectment for the possession of the property under it, the defendant cannot be heard to dispute the value, as indicated by such a sale.

This cannot and should not be the rule. The beneficent purpose of the law in such case would be entirely defeated, and the circuit judge did right in overruling the objection of plaintiff's counsel to defendant's showing the actual value of the homestead, upon the trial, at the time the levy was made.

It was to avoid the consequence of the creditor's taking the course I have in the cases above supposed, and others which might be suggested, that the legislature provided for a preliminary appraisal of the homestead before sale; also that the debtor might have the right to redeem from the execution levy without further expense or proceedings, if desired, if the appraisal should be regarded as properly made and just. This is what the defendant asked to have done in this case.

There is nothing to the suggestion of plaintiff's counsel that the defendant aided or desired the sale of her property, or that she desired to cheat the creditors, or that she did anything which could be construed into a waiver or abandonment of her homestead, or homestead right in the property. We do not think the record tends to show any such thing; but on the contrary, that she not only claimed, but has relied upon, her constitutional rights; and if she was mistaken as to what they were, that it should be made to appear by a fair application of the rules of law provided for the determination of that question.

The value of this homestead was really the only question to be determined in this case. Six witnesses on each side were allowed to testify upon the subject, and no more. The refusal to allow more to testify on the part of the plaintiff is assigned as error; but we think there was no abuse of discretion on the part of the court in not allowing more cumulative evidence upon this point. Under the circumstances of this case, I can see no reason why a larger number than composed the panel of jurors to try the cause should have been necessary.

The jury, under the charge of the court, which was fair and unexceptionable, found the value of the homestead not to exceed fifteen hundred dollars, and the defendant had judgment accordingly.

There was no ruling in receiving the testimony in the case which was erroneous. Neither do I think anything was allowed to go to the jury in the opening or closing statements of counsel for the defendant which was prejudicial to the plaintiff, or unwarranted by the rules of practice relating to that subject.

A statement of facts by counsel in the opening to the jury, wholly inadmissible under the issue, and a statement of facts admissible under the issue but not proved, made to the jury in closing the case, is one thing; and a statement in the opening, showing the bearing of facts admissible under the issue and expected to be proved, and showing how the issues in the

case are to be naturally affected by such facts, and statements made illustrating the relation of the facts one to another, and showing what must be the necessary and final outcome, and the consequences naturally resulting therefrom, however strong and forcibly presented, and however much they may be calculated to appeal to the feelings, reason, or judgment, are other and quite different things.

In the first case the statements are highly prejudicial and improper; in the second, entirely proper, and not unfrequently of much service to the jury in arriving at a correct and satisfactory conclusion. I had occasion to express my views in the case of *Maclean v. Scripps*, 52 Mich. 236, upon this subject, and I have as yet found no good reason to change them.

We do not consider the dower question raised necessarily involved in the case, and are not required to pass upon it now.

I think the judgment should be affirmed.

CHAMPLIN, J. I concur in what Mr. Justice Sherwood has said relative to the defendant's right to maintain the possession of the land in question as a homestead.

I do not think that where the quantity is within the constitutional limit, but is claimed by the creditor to exceed the value of a constitutional homestead, the creditor can ignore the provisions of the statute, and proceed to a sale, and try the value of the homestead in an action of ejectment.

The statute points out the method of proceeding in such case, and must be followed, or the sale is unauthorized. In this case all the testimony regarding the sale, as well as the value of the property, was, in my opinion, improperly admitted in evidence.

The circuit judge should have directed a verdict for the defendant.

CAMPBELL, C. J., dissented.

HOMESTEAD STATUTES ARE LIBERALLY CONSTRUED: *Deere v. Chapman*, 79 Am. Dec. 350.

SALE OF HOMESTEAD UNDER EXECUTION: See *Blue v. Blue*, 87 Am. Dec. 267, and note discussing the question at length.

HOMESTEAD CAN BE CONVEYED OR ENCUMBERED ONLY AS PRESCRIBED BY STATUTE: *Ring v. Burt*, 97 Am. Dec. 200, and note.

DETROIT BASE-BALL CLUB v. DEPPERT

[61 MICHIGAN, 68.]

COURTS CANNOT LIMIT EXTENT, UP OR DOWN, TO WHICH ONE MAY ENJOY HIS PROPERTY, and if he goes higher than his neighbor, without interfering with the rights of others or injuring his neighbor, he subjects himself to no liability.

INJUNCTION WILL NOT LIE TO RESTRAIN LAND-OWNER FROM ERECTING AND USING a structure on his premises to overlook exhibitions on adjoining grounds to which an admission fee is charged, as those of a base-ball club, where it does not appear that the complainant enjoys any exclusive franchise from the legislature, or under any provision of the city charter or by-laws, or under any resolution or other action of the city council, in the use of its grounds. If in such case the complainant has been pecuniarily injured, the remedy at law is wholly adequate.

INJUNCTION. The opinion states the case.

John A. Bell, for the complainant.

George X. M. Collier, for the defendant.

By Court, SHERWOOD, J. The complainant is a corporation, organized under the laws of this state for the purpose of engaging in rowing, fishing, hunting, and other lawful sporting purposes, and to promote and encourage playing the game of base-ball.

The defendant lives in the city of Detroit, residing in a house upon a lot which he owns, and upon which he also has a barn. On Brady Street, in the city, the complainant occupies under a lease a parcel of land adjoining that of the defendant, and which is inclosed by a high board fence. This place is called Recreation Park, and is used by the plaintiff as its play-ground, in which its games are played and sports conducted.

The company is a member of the National Base-ball League, which consists of eight clubs, each of which plays a game against each of the others. At the games in the park a large number of persons are usually present, and an admittance fee of fifty cents is charged by the company to those who are not members of the club, and good accommodations have been provided, at large expense to the club, for the use of spectators.

The bill of complaint states that the club had several games to play, under engagements made with other companies, at the park during the year 1885, when this suit was commenced; that the base-ball season begins in May, and continues until

October, in each year, and that during the season fifty-six games are played.

Complainant further avers that the expenses of the club are over three thousand dollars per month, and that the company relies largely upon the admittance fees to defray such expenses; that the games of the club and all of its entertainments are conducted with propriety, and nothing illegal or offensive to the spectators is permitted, and their games and sports have the confidence and support and patronage of the public; that the club has used every reasonable means to protect itself in the rightful use and enjoyment of the property used by it; that for this purpose the fence inclosure has been made nine feet high, and at some points, where persons outside have annoyed the company, and damaged it by attempts, partially successful, to witness the games without paying the entrance fee, the fence and protecting screens have been made much higher.

The bill then alleges:—

“11. That the defendant has constructed upon land occupied by him on the south side of Leland Street, in close proximity to the grounds leased and occupied by your orator, a stand for the accommodation of persons who desire to see the games played on the grounds of your orator.

“12. That said stand is erected upon the roof of a barn or other building, has steps leading up to it, so that spectators can readily have access thereto, and is of such a height as to overlook the grounds of your orator, and gives the persons thereon an opportunity to witness the games played upon said grounds; that said stand was erected by said John Deppert, Jr., for the purpose of enabling persons whom he might admit thereto to witness the games of base-ball played on said Recreation Park by your orator, and for no other purpose.

“13. That said stand has been heretofore occupied by a considerable number of persons, at sundry and divers games played upon the grounds of your orator, during the season which began on the first day of May, 1885, the number of persons so occupying the stand reaching from twenty-five to one hundred at each game.

“14. That an admission fee is generally charged to such stand by the said defendant, but the fee so charged is much less than that charged by your orator, so that your orator is deprived of profits which would otherwise inure to it in the legitimate use of its property.

"15. That, although requested so to do by your orator, said John Deppert, Jr., refuses to refrain from using said stand for the purpose of enabling spectators to witness therefrom the games played upon the grounds of your orator; that he keeps said stand upon his premises, ready for use whenever a game is played by your orator, and threatens so to use said stand whenever a game is played hereafter by your orator; and that your orator is informed and believes, and charges the fact to be, that said defendant is financially wholly irresponsible; that the nuisance to your orator so maintained by him is a constantly recurring one, and your orator has no adequate remedy at law."

The bill prays that the defendant may be perpetually enjoined from making the use of his buildings and premises in the manner alleged by complainant to be injurious to its interest, and for general relief.

The answer admits substantially the averments contained in the bill, as above stated, except as contained in the foregoing paragraphs numbered 11, 12, 13, 14, and 15, and further says that the erection of the high board fence has seriously damaged his premises, and that the ball plays have seriously injured the quiet use of his premises, and that both are an intolerable nuisance; that the members of the company, when playing, frequently, in pursuit of the ball, trespass upon defendant's premises, and that often he has been obliged to call to his aid the police to quell fights and brawls of the roughs who assemble there to witness the games, and he is greatly disturbed in the peaceable possession of his property thereby; that paragraphs 11, 12, 13, and 14 are admitted, except so far as they allege his stand was erected for any unlawful purpose, or to the injury of complainant, and as to these averments, they are denied.

He further states in his answer that he erected his barn, and the stand on the roof, and that at times his friends congregated there, and that he sells refreshments there; that the premises belong to him; that the erections thereon have been examined by the board of building inspectors of the city, and pronounced safe and secure; that he uses his premises at times for the purposes of amusement, and as a means of revenue for the sale of refreshment, and that he has the legal right so to do, so long as he obeys the law; that he erected the stand only when the high board fence was erected so as to disturb him in his rights to enjoy his property and the pure

air and unobstructed views in the outlook, equally with his neighbors; and he admits that he does refuse to accede to the request of the complainant to refrain from the use of his premises to gratify the pleasure of his neighbors and friends in the manner above stated.

He further denies that he is irresponsible or insolvent, and expressly avers that he is worth over three thousand dollars, over and above all exemptions in real and personal property. He also denies that his property, or the use he makes of it, is a nuisance, and insists that if defendant has any grievance, as alleged in the bill, its remedy is perfect at law. The answer was sworn to by the defendant.

The cause was heard on pleadings before Judge Chipman in the superior court of Detroit, who dismissed complainant's bill, with costs.

We think the case was correctly decided, and the decree entered is right.

It does not appear that the complainant enjoyed any exclusive franchise emanating from the legislature, or under any provision of the charter or by-laws of the city, or under any resolution or other action of the city council, in the use it made of the park, or that it had any right to control the use, in any manner, of the adjoining property. Neither does it show that any persons visiting the refreshment-stand of the plaintiff would have otherwise paid the admittance fee and entered the complainant's park, or that the defendant in any manner prevented them from so doing if they wished. It is difficult to see how the complainant has been pecuniarily injured, and this is the grievance of the complaint; but if it has, the remedy at law is entirely adequate. Courts cannot limit the extent, up or down, to which a man may enjoy his property; and if he goes higher than his neighbor, so long as he does not interfere with the rights of others, or injure his neighbor, he subjects himself to no liability.

The decree must be affirmed, with costs.

CAMPBELL, C. J., dissented.

INJUNCTION OUGHT NOT TO BE GRANTED unless the injury is pressing, and the delay dangerous, and there is no adequate remedy at law: *Goodrich v. Moore*, 72 Am. Dec. 74, and note 78; *Mayor etc. v. Groshon*, 96 Id. 591, and note 596; *Richard's Appeal*, 98 Id. 202, and note 206; *Kennerty v. Etewan Phosphate Co.*, 43 Am. Rep. 607.

COURTS WILL RESTRAIN ERECTION OF BUILDING INTENDED FOR USE THAT WILL BE NUISANCES PER SE: *Rhodes v. Dunbar*, 98 Am. Dec. 221, and see note 229.

circuit court for any county of this state where the plaintiff resides, or service of process may be had, and in cases where the plaintiff is a non-resident, in any county of the state, against any corporation not organized under the laws of this state, in all cases where the cause of action accrues within the state of Michigan, by service of a summons, declaration, or chancery subpoena, within the state of Michigan, upon any officer or agent of the corporation, or upon the conductor of any railroad train, or upon the master of any vessel belonging to and in the service of the corporation against which the cause of action has accrued; provided, that in all such cases no judgment shall be rendered for sixty days after the commencement of suit; and the plaintiff shall, within thirty days after the commencement of suit, send notice by mail to the corporation defendant at its home office": How. Stat., sec. 8145.

William A. Underwood and Henry M. Cheever, for the defendant and appellant.

George F. Edwards, for the plaintiff.

By Court, MORSE, J. The plaintiff in this action brought suit against the defendants upon a draft drawn at Richmond, Indiana, by the S. L. Wiley Construction Company, per S. L. Wiley, president, upon the Niles Water Works, at Niles, Michigan, for \$2,499, payable to the order of plaintiff four months after date.

Proper service was had upon the drawee, and service was made upon the S. L. Wiley Construction Company by delivering a copy of the declaration, with notice of entry of rule to appear and plead, etc., to Solon L. Wiley, president of said corporation, at the city of Niles, on the twenty-second day of July, 1885.

On the thirty-first day of July, 1885, the said corporation defendant filed in the cause a plea in abatement, setting forth that it was a foreign corporation, created by and existing under the laws of Massachusetts, having its domicile and principal office at Greenfield, in said state, and that no original writ of summons, nor declaration, or other process or legal notice, had been served upon it in this state; that it has no officer, agent, or attorney in Michigan authorized to receive service of legal process, or to appear for it in legal proceedings in the circuit court for the county of Berrien, where this action was pending, without special direction; that none of its officers or agents

reside in Michigan, or have any office or place of business therein, and that it has not authorized any agent or any one to appear for it in this action, except for the special purpose of objecting to the jurisdiction of the court.

That Solon L. Wiley, upon whom the declaration was served, was not, at the time of such service, in the state of Michigan on official business for the said defendant, nor in any official character as the officer of such corporation, nor otherwise than casually and accidentally, and not as representing the defendant; and that he was not authorized to receive service, nor to represent it as an officer or otherwise.

This plea was verified by said Solon L. Wiley, who deposes in the jurat that he is president of the S. L. Wiley Construction Company, and makes the affidavit in its behalf and by its direction.

It does not appear from the record that any notice of the filing of this plea was ever served upon plaintiff's attorney.

August 13, 1885, the Niles Water Works pleaded the general issue.

The plaintiff, without paying any attention to this plea of the construction company, proceeded to enter its default, to make it absolute, assess damages, and, upon the trial of the issue made by the Niles Water Works, entered a joint judgment against both defendants.

The S. L. Wiley Construction Company asks a reversal of this judgment as to it, claiming no proper service, as stated in its plea, and also alleging that the plaintiff could not proceed, even if the court obtained jurisdiction by the service of the declaration upon Wiley, without first joining issue upon the plea filed by it, or moving to strike it from the files.

In favor of the first proposition, we are referred to the case of *Newell v. Great Western R'y Co.*, 19 Mich. 336. Since that decision, the legislature has provided for suits by and against foreign corporations in this state. The obvious intent of this statute, in our opinion, was to remedy the defects in the prior laws, as indicated in the opinion filed in the *Newell* case. There is no dispute in the present case but that Wiley was president of the corporation at the time the service was made upon him.

We cannot hold, under the statute above referred to, that the officer or agent of the corporation within this state must be here upon official business for his corporation, or specially authorized by it to receive service. To do this would be to

allow the individual upon whom the service is made to determine in most cases for himself, without fear of successful contradiction, whether, at the particular moment of such service, he was acting as such officer or agent, or as a private person. It would have a tendency to thwart the special purpose and object of the statute, and such we do not think was the intent of the legislature. The officer or agent must be presumed and held as such for the purposes of service under the statute, and cannot throw off his representative capacity at will, as he would an outer garment, in order to defeat its manifest object.

No doubt but the better practice in this case would have been to have moved to strike this plea from the files. But no notice having been served upon the plaintiff of its filing, and the fact being undisputed and admitted that Wiley was the president of the corporation, and therefore the service good and the plea bad, under our construction of the statute, the proceeding to judgment without noticing the plea was a mere irregularity, doing no harm to defendant, and not affecting the jurisdiction of the court.

If the defendant corporation had filed an affidavit of merits, and asked that the default might be opened or the judgment vacated in the court below, there might have been good ground, in the discretion of that court, for granting such an application. But it has contented itself with attacking the jurisdiction of the court on writ of error; and the defect, if any, in the proceedings to judgment after the filing of the plea is one of irregularity in practice, and not one operating in any way upon the jurisdiction.

The judgment is therefore affirmed, with costs.

SERVICE OF PROCESS ON FOREIGN CORPORATION: See *Hampson v. Wear*, 66 Am. Dec. 116, and extended note 121; *Mineral Point R. R. Co. v. Keep*, 74 Id. 124, and note 133; *Andrews v. Michigan Central R. R. Co.*, 97 Id. 51; *Gibbs v. Queen Ins. Co.*, 20 Am. Rep. 513.

SERVICE OF PROCESS UPON OFFICER OF FOREIGN CORPORATION, WHO IS TEMPORARILY IN ANOTHER STATE, and who does not voluntarily appear to the action, does not give the courts of that state jurisdiction over the corporation: *Latimer v. Union Pacific R'y*, 97 Am. Dec. 378.

STRIKING OUT PLEAS AND DEFENSES: See *People v. McCumber*, 72 Am. Dec. 515, and extended note 521; *Hayward v. Grant*, 97 Id. 228.

HALL v. KIMMER.

[61 MICHIGAN, 269.]

CHARGE BEYOND TEN DOLLARS FOR SERVICES IN OBTAINING PENSION IS, UNDER LAWS OF UNITED STATES, AGAINST PUBLIC POLICY, and cannot be sustained; and the money taken beyond the amount allowed for such services may be recovered back by the pensioner as money received for his use.

CLAIM WHICH IS ILLEGAL AND ABSOLUTELY FORBIDDEN BY STATUTE cannot lawfully be made the subject of arbitration.

FEDERAL STATUTE LIMITING FEE RECOVERABLE FOR OBTAINING PENSION IS INTENDED for protection of the soldier and his family from unreasonable and unjust exactions on the part of agents who assume to act in his interest in collecting his pension, and should be applied by the courts, when invoked, in such a manner as to afford the protection intended.

ASSUMPSIT. The opinion states the case.

Henry A. Shaw, for the plaintiff and appellant.

Herbert E. Winsor, for the defendant.

By Court, SHERWOOD, J. The action in this case is *assumpsit*, brought before a justice of the peace.

The plaintiff's declaration was verbal upon all the common counts, and added thereto was a special count on a contract for services of the plaintiff in obtaining pension money to which the defendant was entitled from the general government, whereby the plaintiff, under the arrangement, was to have not less than a quarter, and not more than one half, of the amount received in case of success, and nothing in the case of failure.

Defendant's plea was the general issue and notice of set-off, and he further gave notice that he would show on the trial that if the plaintiff had any agreement with him for services it was while he was acting as his agent in obtaining his pension from the government for defendant's services as a soldier in the war of the Rebellion.

On the trial of the case before the justice, the plaintiff recovered the sum of three hundred dollars.

Defendant appealed the case to the circuit court for the county of Calhoun, where the cause was retried before Judge Hooker without a jury.

Upon the trial it was made to appear that the plaintiff collected pension money to the amount of \$1,500, and that the defendant paid him for his services \$150. The plaintiff then offered to prove that the parties submitted the plaintiff's

further claim for services to arbitrators, and that the arbitrators made an award that the defendant should pay the plaintiff the further sum of \$100. This testimony, being objected to, was ruled out, and the ruling was excepted to by plaintiff's counsel.

After the testimony in the case was taken, the circuit judge found the following facts:—

"1. Plaintiff was engaged in the business of practicing law in justices' courts, and in procuring pensions through a firm of claim agents at Washington, D. C.

"2. His mode of doing business was to send to said firm the names of persons who had been in the service, receiving in return from said firm cards upon which were printed questions to be answered in writing thereon. The questions were written by him, and returned to the agents in Washington, who prepared and sent forward to him proper papers, and if possible, procured the allowance of the claim, in which case they paid plaintiff for his services.

"3. Defendant, believing himself entitled to a pension, asked plaintiff's advice about the matter, and what he would charge to assist him in getting it. Plaintiff said he had received different prices, depending on the amount paid out for expenses,—in some cases one fourth and in others one half the amount procured,—but as he could not lawfully contract for over ten dollars, he would have to leave it to defendant to say what he should have. Defendant thereupon told him to go on, and he would pay all expenses, and what was right for plaintiff's services. This was in 1879.

"4. Plaintiff procured and returned card mentioned, and went with defendant to get application signed, and also performed other services in the way of obtaining proof, writing, and receiving letters, etc.

"5. Defendant's application was finally allowed, whereupon he paid the plaintiff ten dollars as and for the fee of the Washington firm, taking their receipt signed by plaintiff as agent therefor. Neither considered it as including any compensation to plaintiff.

"6. Plaintiff never forwarded this money to the Washington firm, claiming it to be his due from them on other claims, and he authorized by them to retain it.

"7. Defendant subsequently paid plaintiff the sum of \$150 for his services out of the money received from the government as pension upon said allowance.

"8. Plaintiff brought this action to recover a further sum, and took judgment in court below for three hundred dollars.

"9. No definite proof was made as to plaintiff's expenses or disbursements."

The conclusions of law are as follows:—

"1. Plaintiff was a claim agent, within the meaning of the law, and entitled to no more than ten dollars for procuring the pension. This was full compensation for all he should do, or procure to be done by his Washington correspondent.

"2. Having received ten dollars for procuring said pension, he can recover no more for his services.

"3. The payment of \$150 was without consideration, and, so far as defendant is concerned, unlawful, and may be recovered back by way of set-off.

"4. Defendant should take judgment for \$150, and costs."

Judgment was subsequently entered, in accordance with the finding, in favor of the defendant, under his plea of set-off, for \$150, and costs to be taxed. Plaintiff brings the case here for review.

We think, under the findings and proofs contained in the record, the judgment is correct, and must be affirmed.

There seems to be no question but that the services claimed for were in procuring the defendant's pension in 1879. This is fully established by the findings of the circuit judge, and the plaintiff admits the receipt of the \$150, besides the ten dollars which he claimed was for the agent at Washington.

Under the laws of the United States, ten dollars was all he was entitled to recover, and anything beyond that is positively forbidden by the statute. A charge beyond ten dollars is, under the law, against public policy, and cannot be sustained: *United States v. Moyers*, 15 Fed. Rep. 411. The money taken, beyond the amount allowed for such services, by the agent, may be recovered back by the pensioner, as money received for his use: *Smart v. White*, 73 Me. 332; 40 Am. Rep. 356. It was therefore competent for the defendant to recover the amount so illegally taken, under his plea of set-off, and judgment was properly rendered therefor.

The claim of plaintiff, being illegal and absolutely forbidden by statute, could not lawfully be made the subject of arbitration, as claimed by plaintiff's counsel, between the parties, and the court committed no error in ruling out the testimony upon that subject; and for the same reason no error was committed in disallowing the amendment offered by plain-

tiff's counsel to his bill of particulars for the purpose of supporting the testimony relating to the amount awarded.

The federal statute is a beneficent one, intended for the protection of the soldier and his family from unreasonable and unjust exactions on the part of agents who assume to act in his interest in collecting his pension; and it should be applied in all cases, when invoked, in such manner as to secure the object and afford the protection intended. We think the law applies with much force to the facts disclosed in the record, and Judge Hooker's conclusion in the matter must be affirmed, with costs of all the courts.

WHERE AGENT TAKES FROM PENSIONER FEE IN EXCESS OF STATUTORY ALLOWANCE for obtaining his pension money, the pensioner may recover the excess from him, although both parties acted innocently, and the agent has paid the amount to his principal: *Smart v. White*, 40 Am. Rep. 356. And where an attorney receives the statutory fee for obtaining a pension, he cannot maintain an action against a third person, by whom he was originally employed, upon his agreement to pay him the reasonable value of his services: *Wolcott v. Frissell*, 45 Id. 272.

AWARD WILL BE SET ASIDE WHERE PARTY HAS KNOWINGLY PRESENTED FICTITIOUS CLAIM: *Emerson v. Udall*, 37 Am. Dec. 604; *Chambers v. Crook*, 94 Id. 637, and note 642.

PENSIONS, EXEMPTION OF FROM CLAIMS OF CREDITORS: See *Friend v. Garcelon*, 52 Am. Rep. 739; *Hissem v. Johnson*, 55 Id. 327; *Robson v. Walker*, 56 Id. 878; *Craws v. White*, 41 Id. 408.

PEOPLE v. GADWAY.

[61 MICHIGAN, 285.]

TERMS "TO REGULATE" AND "TO PROHIBIT" ARE NOT SYNONYMOUS.
AMENDATORY ACT WHICH IS HIGHLY PENAL IN ITS CHARACTER precludes a liberal construction of the title of the original act, such as would extend it to objects not within the meaning of the language employed.
CONSTITUTIONAL LAW — AMENDMENT NOT WITHIN TITLE OF ORIGINAL ACT.
 — An act entitled "An act to regulate the sale of spirituous liquors," etc., was amended by adding a new section prohibiting absolutely the sale of such liquors within certain specified limits. *Held*, that the amendment was not embraced in the title of the original act, and therefore was unconstitutional and void.

Thomas J. Davis and Theo. Hollister, for the respondent.

Moses Taggart, attorney-general, for the people.

By Court, CHAMPLIN, J. In 1881, the legislature, by act No. 259, passed a bill entitled "An act to regulate the sale of spirituous, malt, brewed, fermented, and vinous liquors: to

prohibit the sale of such liquors to minors, intoxicated persons, and to persons in the habit of getting intoxicated; to provide a remedy against persons selling liquors to husbands or children in certain cases; and to repeal all acts or parts of acts inconsistent herewith."

By act No. 178 of the Session Laws of 1883, this act was amended by adding thereto a new section, to stand as section 15 of said act. The title to the amendatory act did not indicate the object or purpose of the amendment. The added section reads as follows:—

"Sec. 15. It shall not be lawful for any person, including druggists, by himself, his clerk, agent, or servant, directly or indirectly, to sell, or offer for sale, furnish or give, any spirituous, malt, brewed, fermented, or vinous liquors, or any beverage, liquors, or liquids containing any spirituous, malt, brewed, fermented, or vinous liquors, or suffer the same to be done, at any time, within a radius of two miles from the grounds or premises of the Michigan Military Academy, an institution of learning, located near Orchard Lake, in the county of Oakland, in this state. For any violation of any of the provisions of this section, the person so offending shall be punished by a fine of not less than two hundred dollars, nor more than five hundred dollars, or by imprisonment not exceeding one year, in the discretion of the court."

At the December term of the circuit court for the county of Oakland, on complaint made, the prosecuting attorney of Oakland County filed an information against the above-named respondent, charging him with a violation of section 15 of the act as amended.

Gadway kept a hotel within three fourths of a mile of the grounds of the Michigan Military Academy. The academy has a vacation from the middle of June till September, and is not run during the vacation as an educational institution.

On the 26th of August, 1885, the supervisors held a picnic at Gadway's, and the evidence showed that he, through his agents and servants, sold beer upon that occasion to different persons named in the information. After all the evidence was introduced, the counsel for the respondent requested the court to charge the jury as follows: 1. The statute on which this information is based is unconstitutional and void; 2. The offense charged is not an offense at common law, and not an offense under the general statutes of this state; 3. The jury must acquit the prisoner.

The court refused each of the above requests, and under his instructions the jury returned a verdict of guilty.

The error assigned upon the refusal of the court to grant the first request is all that need be considered; for if the statute is not in conflict with the provisions of the constitution, the conviction must stand. It is claimed by counsel for respondent that section 15 is not within the title of the act, to which it is added by way of amendment.

In applying the constitutional test to this law, it must be regarded as if section 15 was embraced in the original when passed; and if it is embraced in the title of the act of 1881, it is valid; otherwise not. What objects are expressed in the title of that act? They are,—1. To regulate the sale of spirituous, malt, brewed, fermented, and vinous liquors; 2. To prohibit the sale of such liquors to minors, and to persons in the habit of getting intoxicated; 3. To provide a remedy against persons selling liquors to husbands or children in certain cases; 4. To repeal all acts, or parts of acts, inconsistent therewith.

The learned attorney-general insists that the section is embraced in the first object above enumerated, and is included in the expression, "to regulate the sale of spirituous liquors," etc., because the construction of titles to acts under our constitution covers that which is directly or indirectly connected with the subject named. He insists that "the legislature had an object in view, and if by law enacted to accomplish it others are affected, it would not invalidate the law. It was not only to protect the school-boys from the evils of intemperance, but to preserve order and peace within the vicinity of the school-grounds."

If such was the object of the legislature, they have adopted a measure strangely inapt to effectuate that object. It is in proof that the grounds or premises of the Michigan Military Academy comprise about one hundred acres of land. Now, while the act prohibits absolutely the sale or gift of spirituous, fermented, or vinous liquors within the radius of two miles from the premises, it nowhere prohibits the sale or gift of such liquors upon the premises of the academy; and there is nothing in the law which prevents the township board of the township in which the premises are situated from licensing any number of saloons or places for the sale of such liquors upon the premises of the academy, under the general law.

The peculiar characteristic of the section added by the

amendment is the restricted and local application of the prohibition. It segregates from the general territory over which the body of the act extends a certain circle around the premises of the military academy, and in that circle entirely prohibits the traffic. In all other parts of the state it regulates; here it prohibits. Unless "to regulate" is synonymous with "to prohibit," the fifteenth section does not fall within the object embraced in the title of the act. The legislature understood that the words were not synonymous; for in the title of the act it expressed one object to be to prohibit, not regulate, the sale of liquors to minors, to persons intoxicated, and to persons in the habit of getting intoxicated; and had it intended originally to extend the prohibition around the premises of the military academy, it can scarcely be doubted that it would have expressed that object in the title of the act.

The amendment is highly penal, and precludes a liberal construction of the title, so that it will extend to objects not within the meaning of the language employed.

Section 15 of the act as amended must be declared unconstitutional and void, and the conviction must be set aside, and the prisoner discharged.

CONSTITUTIONAL LAW — PROVISION THAT STATUTE SHALL EMBRACE BUT ONE SUBJECT, WHICH SHALL BE EXPRESSED IN TITLE, OBJECT AND CONSTRUCTION OF: *City of St. Paul v. Colter*, 90 Am. Dec. 278, and see full collection of cases in note 284; *Mills v. Charleton*, 9 Am. Rep. 578; *Giddings v. City of Antonia*, 26 Id. 321; *Neuendorff v. Duryea*, 25 Id. 235; *State v. Ah Sam*, 37 Id. 454; *Howell v. State*, 51 Id. 259; *Northwestern Mfg. Co. v. Wayne Circuit Judge*, 55 Id. 693.

STATUTE PROHIBITING SALE OF INTOXICATING LIQUORS OUTSIDE OF INCORPORATED CITIES, TOWNS, AND VILLAGES, BUT PERMITTING IT IN THOSE LOCALITIES, IS NOT UNCONSTITUTIONAL: *State v. Berlin*, 53 Am. Rep. 677.

MATHEWS v. PHELPS.

[61 MICHIGAN, 327.]

IN CONSTRUING CONTRACT OF GUARANTY, GENERAL RULE ARISING FROM IMPLICATION OF LANGUAGE USED IS, that when the amount of the liability is limited, and the time is not, the contract should be construed as a continuing guaranty.

IN ALL CASES CONTRACT SHOULD BE SO CONSTRUED AS TO CARRY INTO EFFECT the intention of the parties, and such intent must be ascertained from the language of the instrument, and the facts and circumstances attending its execution.

ADMISSIONS OF COPARTNER AND OF JOINT CONTRACTOR HAVE BEEN HELD ADMISSIBLE IN EVIDENCE to bind, not only themselves, but their co-defendants; but whether the admissions of a surety are proper evidence to bind a co-surety is a question undetermined in the particular case.

JUDGMENT WILL NOT BE REVERSED FOR ERROR IN ADMITTING TESTIMONY that could not by any possibility have operated prejudicially to the party defeated.

ASSUMPSIT. The facts appear in the opinion.

James H. Pond, for the defendants and appellants.

George F. Beasley, for the plaintiff.

By Court, **CHAMPLIN, J.** Suit was brought by the plaintiff against the defendants before a justice of the peace, in which the plaintiff declared against the defendants in an action of *assumpsit* upon all the common counts, and on a memorandum of suretyship, as follows:—

“DETROIT, October 22, 1883.

“It is hereby mutually agreed that William E. Moloney and Ralph Phelps, Jr., is to become the surety of Charles Savenac, for the sale of cigars, to James L. Mathews, to the extent of two hundred dollars.

“RALPH PHELPS, JR.

“WILLIAM E. MOLONEY.”

At the trial in the circuit court, to which the case had been appealed, it appeared that Mathews was a manufacturer of cigars in the city of Detroit, and had entered into an arrangement with Charles Savenac to sell cigars for him, and return the money to Mathews, for which Mathews was to give five dollars a thousand “all round,” and defendants signed the written agreement above set forth for the purpose of becoming responsible for the money Savenac did not return, and delivered the same to the plaintiff, who thereupon furnished Savenac with samples, and he proceeded to sell cigars for the plaintiff. Under these facts, the court construed the contract as if it read as follows:—

“DETROIT, October 22, 1883.

“It is hereby mutually agreed that William E. Moloney and Ralph Phelps, Jr., is to become the surety of Charles Savenac to James L. Mathews, for the sale of cigars, to the extent of two hundred dollars.”

We think the court construed the contract of suretyship correctly, in the light of the surrounding circumstances. If construed literally, it would be meaningless. By the transposition of a single phrase, the intention of the parties is expressed in clear and unambiguous language.

The record further shows that Savenac failed to return to the plaintiff money received by him on the sale of cigars, to the amount of \$169.04. It also appears that the sales made by Savenac for the plaintiff amounted to more than one thousand dollars; and defendants' counsel contends that the contract of suretyship did not extend beyond the sale of two hundred dollars' worth of cigars, and was not continuous; and plaintiff having received returns exceeding two hundred dollars, the defendants are not liable in this action. This would be a narrow construction to place upon the terms of the contract. It is the extent of the liability, and not the extent of the sales, that is limited to two hundred dollars.

The general rule arising from the implication of the language used is, that when the amount of the liability is limited, and the time is not, the contract should be construed as a continuing guaranty: *Gard v. Stevens*, 12 Mich. 295; 86 Am. Dec. 52.

In all cases, the contract should be so construed as to carry into effect the intention of the parties; and such intent must be ascertained from the language of the instrument, and the facts and circumstances attending the execution thereof.

Viewing the contract under consideration in the light of the circumstances under which it was made, it is plain that the guaranty was intended to continue so long as Savenac should continue to sell cigars for Mathews, or until ended by notice from the sureties that they would not continue to be responsible any longer, the extent of their liability being fixed at two hundred dollars.

The court permitted plaintiff to testify to admissions of defendant Phelps as to the liability of defendants upon the contract. This the counsel for defendants insists is error, for the reason that admissions made by Phelps could not bind his co-surety, Moloney. The admissions of a copartner and of a joint contractor have been held admissible in evidence to bind, not only themselves, but their co-defendants; but whether the admissions of a surety are proper evidence to bind a co-surety is a question which need not be determined in this case. No testimony was introduced on behalf of defendants. The testimony of the plaintiff made out a case under which he was entitled to recover without the admissions as to liability of defendant Phelps. The error, if any was committed, could not by any possibility have prejudiced the defendants, and the judgment will not be reversed for that reason.

Perceiving no error prejudicial to defendants, the judgment is affirmed.

LETTERS OF CREDIT AS GUARANTY: *Wheeler v. Mayfield*, 98 Am. Dec. 545, and note 547; *Lafargue v. Harrison*, 59 Am. Rep. 416; *Boehme v. Murphy*, 11 Id. 485; *Central Sav. Bank v. Shine*, 8 Id. 112.

CONTRACT OF GUARANTY, HOW CONSTRUED: *Hotchkiss v. Barnes*, 91 Am. Dec. 713; *Gates v. McKee*, 64 Id. 545, and note 549; *Barnes v. Barrow*, 19 Am. Rep. 247.

CONTINUING GUARANTY, WHAT IS AND WHAT IS NOT: *Gard v. Stevens*, 86 Am. Dec. 52, and note 53; *Tootle v. Elgutter*, 45 Am. Rep. 103; *Crittenden v. Fiske*, 41 Id. 146; *Perryman v. McCall*, 41 Id. 782; *Morgan v. Boyer*, 48 Id. 454; *Columbus Sewer Pipe Co. v. Ganser*, 55 Id. 697.

GUARANTY, CONSIDERATION OF: *Evansville Nat. Bank v. Kaufman*, 45 Am. Rep. 204; *Smith v. Easton*, 39 Id. 355; *Mechanics' Nat. Bank v. Frazer*, 29 Id. 20; *Draper v. Snow*, 75 Am. Dec. 408, and note 413.

DECLARATIONS OF PARTNER AGAINST COPARTNER, COMPETENCY OF: *Ocdyn v. Cunningham*, 50 Am. Dec. 186; *Fickett v. Swift*, 68 Id. 214.

ADMISSIONS OF PARTNER, MADE WHILE ENGAGED IN ADJUSTMENT OF UNSETTLED PARTNERSHIP BUSINESS, AFTER DISSOLUTION OF FIRM, may be given in evidence to charge the other partners in relation to such business: *Feigley v. Whitaker*, 10 Am. Rep. 778.

KIPLINGER v. GREEN.

[61 MICHIGAN, 340.]

TENANT UNDER CROPPING LEASE DEPRIVES HIMSELF OF ALL CLAIM TO CROP which he has planted, where, without fault on the part of the landlord, he repudiates the agreement, and voluntarily abandons the premises. In such case, the crop becomes a part of the land, and goes with it.

DOCTRINE OF EMBLEMENTS DOES NOT APPLY where the term of occupancy of leased premises is certain under the contract, and is not determined by the act of the lessor, nor by any other cause than the violation by the lessee of the agreement under which he holds.

REPLEVIN. The opinion states the case.

Van Zile and Fox, for the plaintiff and appellant.

Huggett and Smith, for the defendant.

By Court, MORSE, J. The plaintiff in this action, on the fifteenth day of September, 1883, entered into the following agreement with the defendant:—

"This agreement, made and entered into this fifteenth day of September, 1883, between Alonzo Green, of the city of Charlotte, county of Eaton, and state of Michigan, of the first part,

and Jonas Kiplinger, of the second part, witnesseth: that said second party hereby agrees to move onto and cultivate and farm the said first party's farm, where he now resides, lying in the town of Eaton, and city of Charlotte, in said county, for the term of five years and five months from the first day of November, 1883, on the following terms, viz.:—

“Said second party is to do, or cause to be done, all the work, furnish all the teams and implements necessary in so farming the premises, and is to furnish one half of all the seed to be sowed or planted; and deliver one half of all grain raised on said farm to said first party, in the granary on said farm, and one half of the potatoes and vegetables that shall be raised, after they are dug, on said farm, as said first party may direct.

“Said first party is to furnish one half of the seed for all such crops.

“Said first party is also to have one half of all the hay, straw, and corn-stalks, after they are properly cut and secured by said second party as the first party may direct. Each party is to have one half of the apples, and pick or gather the same. Said first party is to have all the cherries and grapes he wishes that may grow on said farm.

“Each party is to have one half of the pasture, also to furnish an equal amount of poultry, and share equally in its products.

“Said second party is to have a good garden, and divide the same as the other products of the farm.

“Said second party is to pay all the highway taxes on said farm, and is to keep in repair all the fences, and make such new fences as may be necessary on said farm, said first party furnishing the materials to repair and make the same; also to keep in repair all buildings occupied by him, and the wind-mill on said farm; and to have the use of all the dwelling-house on said farm, except the chambers, hall, and parlor of the upright brick house, which shall be exclusively said first party's; also such portions of the cellar as he may desire to use.

“Said second party is also to use what barn room, stabling, and granary that is necessary to accommodate his farming work. All horses and other stock belonging wholly to said second party is to be fed from said second party's share of the products of said farm, or that which he may purchase.

“All sheep or other stock or poultry owned by both parties

shall be taken care of by said second party, and fed from the products belonging to both parties.

"Said second party is to milk the cow or cows of said first party, and let him have all the milk he wants to use for his family, and the rest to make into butter for said first party's family use.

"Said second party is to have all the fire-wood necessary for his use, from said farm, and from the eighty acres in the town of Carmel belonging to said first party, as he, said first party, may direct. Such pieces of land as are now let on said farm to other persons are excepted until their lease expires, and then said second party is to farm such pieces.

"Said second party is to feed and care for the undivided sheep and cows of said first party, the coming winter, from the hay and other feed owned by said first party.

"It is expressly understood and agreed that said first party is to remain in full possession and have full control of said farm, and all that pertains to it, and have full directions as to how all and what crops shall be raised on it by said second party. All of said farming shall be done in a good, thorough, workman-like manner by said second party. Upon the non-performance of any of the above specifications, this agreement shall immediately become null and void. Both of said parties hereby agree to all of the above-mentioned specifications.

"ALONZO GREEN.

"JONAS KIPLINGER."

Under this agreement the plaintiff moved upon the farm about the twenty-third day of October, 1883, and the following summer put in a crop of wheat.

In September, 1884, he served the following notice upon the defendant:—

"CHARLOTTE, MICH., September 30, 1884.

"MR. ALONZO GREEN, Esq.,—*Dear Sir:* You are hereby notified and duly informed that I shall vacate the premises and farm on which I now reside, the same belonging to you, on the first day of April, A. D. 1885, for the following reasons:—

"1. Owing to the unreasonableness of the contract framed by you, which I now find, and am aware, is contrary to all farming customs of the county and vicinity.

"2. On account of the deception and fraud practiced by you in framing said contract, material parts of which you failed to read to me, and which I was not aware it contained.

"Yours,

JONAS KIPLINGER."

—And moved off from the premises the second day of April, 1885. He testified that after the service of the notice he spoke to the defendant once, and told him that if he would give him a better chance than he had under the contract he would stay on, but gave him to understand that he would not stay there unless better terms were given him.

The defendant let a portion of the premises to another tenant, who moved upon the same the day before the plaintiff left. The plaintiff testified, however, that he left the place in pursuance of the intention manifested in his notice, and because he found he could not stand the bargain contained in the contract.

The plaintiff undertook to harvest the wheat put in by him the summer before, but was prevented from doing so by the defendant, who gathered the same. He made a written demand upon the defendant for it, and brought replevin.

Upon the conclusion of the plaintiff's case, showing these facts, the counsel for the defendant, upon the trial, moved to strike out the evidence introduced in plaintiff's behalf as insufficient to warrant a recovery, which the court did, and thereupon directed the jury to find a verdict for defendant.

The plaintiff's counsel contend that this was error, and that upon the facts shown, the plaintiff was entitled to recover for one half the wheat; that the agreement between the parties was not a lease, but a contract to crop the land on shares; that the relation of landlord and tenant did not exist; that the parties were tenants in common in the wheat; and by the action of the defendant in cutting and thrashing the same, and refusing to account for any of it to plaintiff, he was guilty of a conversion of plaintiff's share, for which plaintiff was entitled to bring replevin. They insist that the abandonment of the contract and the farm cuts no figure in the case, as plaintiff's interest in the crop vested as soon as the same was sown; that it became personal property, and he might have sold his share before he left the place, and the purchaser obtained a valid title thereto.

We find no error in the action of the circuit court.

It can make no difference in the law applicable to the facts in this case what was the particular name or nature of the plaintiff's holding under this agreement. His rights must be gathered from the contract, and considered in relation to its terms.

Whether it be called a lease or a mere cropping agreement,

its construction and its effect, as far as the plaintiff's claim to this crop of wheat is concerned, must be the same. He went upon the farm and put in the wheat under and by virtue of this instrument, and whatever rights he can legally claim must accrue from and rest upon its provisions; and his counsel, upon the trial in the court below, expressly stated that he based his right to recover upon the contract, and his acts under it.

When he voluntarily abandoned the farm, and forfeited the contract under his notice, he could no longer claim any rights under it.

He admits that, after serving the notice, he did nothing upon the farm except to care for the stock upon it.

There is no theory of the law under which the plaintiff could recover one half of this crop under a contract which he had, upon his own motion, repudiated. If so, he might have abandoned the farm and thrown up the contract the next day after the wheat was sown, and held his share. If, before his surrender of the agreement and the possession of the farm under it, he had sold his share of the crop to another, purchasing in good faith, such assignee of his interest would have been entitled to reap and harvest the wheat under this agreement, because of equities which the plaintiff cannot assert after his rescission of the contract, the crop being considered while the agreement is in force as personal property, subject to sale or levy as such.

But when the plaintiff abandoned the premises and surrendered the contract, the wheat became a part of the land and went with it: *Chandler v. Thurston*, 10 Pick. 205; *Carpenter v. Jones*, 63 Ill. 517.

The doctrine of emblements does not apply. The term of the plaintiff's occupancy of the premises was certain and definite under the contract. It was not determined by the act of the defendant, nor by any other cause than the violation by the plaintiff of the agreement under which he held. He cannot profit by his own wrong.

The judgment of the court below as affirmed, with costs.

EMBLEMENTS, RIGHT OF TENANT FOR LIFE TO: *Miles v. Miles*, 64 Am. Dec. 362, and note 369.

LANDLORD AND TENANT — OUTGOING CROPS: See *Reeder v. Sayre*, 26 Am. Rep. 567, and note; *Henderson v. Cordwell*, 40 Id. 93, and note 96.

TENANT UNDER FARMING LEASE CANNOT REMOVE MANURE MADE ON DEMISED PREMISES IN ORDINARY COURSE OF HUSBANDRY: *Gallagher v. Shipley*, 87 Am. Dec. 611, and note 615; *Chase v. Wingate*, 28 Am. Rep. 36.

AS BETWEEN PURCHASER OF LAND ON FORECLOSURE SALE AND MORTGAGOR'S TENANT, crops planted by the latter and mature when the sheriff's deed is executed, although not severed, do not pass by the sale: *Hecht v. Dettman*, 41 Am. Rep. 131.

McCoy v. BRENNAN.

[61 MICHIGAN, 362.]

SALE BY SHERIFF OF PROPERTY LEVIED UPON IN WHICH EXEMPTION IS CLAIMED, MADE IN VIOLATION OF CLAIMANT'S STATUTORY RIGHTS, is a conversion, respecting which he may be regarded as a tort-feasor from the beginning, and he may be regarded as having received goods contrary to the provisions of the statute exempting property from sale on execution.

IN PLEADING EXEMPTION UNDER STATUTE, FACTS WHICH SHOW the property to be exempt should be clearly set forth; but an objection on that ground after all the proof has been admitted comes too late, and an amendment should be permitted to remedy the defect.

EACH MEMBER OF FIRM AGAINST WHICH EXECUTION IS LEVIED MAY CLAIM STATUTORY EXEMPTION from such process, and the right of a partner to make such claim is not affected by the fact that he has drawn more than his share out of the firm assets. This question can only be reached by proceedings in equity upon an accounting and winding up of the partnership.

IT IS NOT NECESSARY THAT PARTNER SHOULD BE ACTIVE MEMBER OF FIRM TO ENTITLE him to his statutory exemption. A married woman who is a member of a firm, though residing with her husband a long distance from the place of business of the firm, and mainly occupied in house-keeping, is nevertheless entitled to claim her statutory exemption in the firm property.

STATUTORY RIGHT OF EXEMPTION IS INDIVIDUAL RIGHT, which one partner may enforce in a separate suit as an individual.

TROVER. The opinion states the case.

T. A. E. and J. C. Weadock, for the plaintiff and appellant.

Shepard and Lyon, for the defendant.

By Court, CHAMPLIN, J. As sheriff of Bay County, defendant levied upon a stock of goods belonging to the firm of E. McCoy & Co., composed of the plaintiff, Elizabeth McCoy, and her two sons, William and Robert McCoy.

Elizabeth was a married woman, and resided with her husband in West Bay City.

The business of the firm was carried on at Pinconning, about twenty miles from the place where plaintiff resided,

by the other two members of the firm. The partnership was formed in February, 1884. The plaintiff was a general partner, and prior to the levy she had drawn from the assets of the firm, from time to time, in money, one thousand dollars, to pay upon a mortgage upon the homestead where she resided. This sum was more than she had ever invested in the business.

She visited Pinconning for the purpose of looking after the business about once in two weeks, or oftener, and when William and Robert McCoy, who were in the active management of the business, came down to Bay City to buy goods, they would report to her the condition of the business, and advise with her as to its management. She was engaged in no other business, and had no interest in any other business, than this grocery firm at Pinconning. While the firm was doing business, she was at home engaged in the ordinary business of housekeeping, occupying a house with her husband, attending and having charge of the details of her housekeeping as her principal occupation. She never took an active part, or any part whatever, in the management of the business at Pinconning.

At the time the levy was made, the partners, William and Robert McCoy, claimed their exemption of \$250 worth each of the goods, which exemption was set apart and delivered to them. The plaintiff also claimed \$250 worth of the stock in trade as exempt, and demanded that the same be set aside to her, which demand was refused by the sheriff, who afterwards sold and disposed of the property; whereupon she brought this action of trover against the sheriff, and in her declaration counted for a conversion in the common-law form of that action, and made no reference to the statute providing for exemptions.

The defendant pleaded the general issue, and attached thereto a justification under the writ of attachment under which he levied. The court charged the jury that, upon the above facts, which were agreed upon, under the declaration, the plaintiff could not recover. Plaintiff brings error, and presents two questions for our consideration: 1. Was the declaration sufficient? 2. Was the plaintiff entitled to recover?

Howell's Statutes, section 7343, provides: "If an action of trover be brought for any goods, or other things received contrary to the provisions of any statute, the plaintiff shall set

forth in his declaration that such goods, or other things, were converted by the defendant contrary to the provisions of such statute, referring to the same, as prescribed in the preceding sections."

The seizure by the sheriff was unlawful. If a portion of the property was exempt, it was the duty of the plaintiff, upon being notified of the levy, to select her exemption, and if she failed to do so, it became the duty of the sheriff to make the selection for her, and it would be a violation of his duty to proceed to a sale without setting out the exempt property. These duties are pointed out by the statute. It is the statute which gives the exemption, and points out the duty concerning it.

A sale by the sheriff contrary to the statute, or without observing its provisions for the protection of the debtor's exemption, is a conversion, respecting which he may be regarded as a tort-feasor from the beginning, and he may be regarded as having received goods contrary to the provisions of the statute exempting property from sale on execution.

Had the exemption consisted of property exempt from execution *eo nomine*, it would be clear that he received the goods contrary to the provisions of the statute; and as the exemption exists solely by statute, in suing the officer it would be necessary to count upon the statute in the declaration, in order to admit proof to show it was exempt from execution. So, in this case, the plaintiff should have declared specially, setting forth the facts which showed the property exempt, and that the property was converted contrary to the provisions of the statute giving her the exemption, referring to the same.

But as the proof was all admitted before the objection was made, we think it came too late, and an amendment should have been and will now be permitted in that respect.

The more serious question is, whether the plaintiff was entitled to an exemption of \$250 from the stock in trade of the partnership property. It is a settled question in this state that each member of a firm against which execution is levied may claim the statutory exemption from execution: *Skinner v. Shannon*, 44 Mich. 86; 38 Am. Rep. 232; *Waite v. Mathews*, 50 Id. 393.

The only reasons urged why the plaintiff is not entitled to the benefits of the statute are,—1. That she has drawn from the firm one thousand dollars, which she has applied to her

individual use; 2. That she was principally engaged in the occupation of housekeeping, and the statute only allows an exemption in the business in which the debtor is wholly or principally engaged.

The first objection cannot be raised by the defendant. The partnership dealings and adjustment between the partners, or between the partners and creditors, cannot be inquired into in this collateral proceeding, nor does the exemption depend upon whether one partner has drawn out more than his share. This question can only be reached by proceedings in equity, upon an accounting and winding up of the concern.

The second reason stated is not sufficient to bar a recovery. The occupation or business referred to in the statute in which a party may be engaged is not that of housekeeping. What property would be exempt to a person engaged in carrying on the ordinary duties of housekeeping?

The record shows that the business of this firm—that is, merchandising—was the principal business in which she was engaged, and that she had no other. I do not think it is necessary that a partner should be an active member of the firm in order to be entitled to his exemption. He may be absent; he may be unable to give his personal attention through illness or inability to render assistance. The law has made no distinction between the active and passive members of a firm. That each should be entitled to his exemption, works no harm or hardship to creditors. Every one dealing with a firm has a right to know, and is supposed to inquire, who compose the firm. Creditors give credit to the firm knowing that each partner is entitled to an exemption in a mercantile firm, and rate them accordingly.

Defendant also claims that the plaintiff cannot maintain a separate action for her exemption, but that all the other members are interested in the property as firm property, and must be joined as plaintiffs in the action. But the right of exemption is an individual right, and not a right of the firm as such. This right conferred by statute upon the individual is the basis of the determination that each partner is entitled to his exemption out of the firm property. If his right is individual, he can enforce it separately, and as an individual. *Newton v. Howe*, 29 Wis. 531; 9 Am. Rep. 616; *Russell v. Lennon*, 39 Id. 570; 20 Am. Rep. 60.

The judgment must be reversed, and a new trial granted.

EXECUTION, HOW LEVIED, AND EFFECT OF DEFENDANT'S FAILURE TO EXERCISE RIGHT OF SELECTION: *People v. Palmer*, 95 Am. Dec. 418, and extended note 423.

EXECUTION SALE, WHEN SHERIFF REGARDED AS TRESPASSER AB INITIO: *Hall v. Ray*, 94 Am. Dec. 440, and note 444.

PARTNERS ARE ENTITLED TO CLAIM BENEFIT OF EXEMPTION LAW as to partnership property: *Stewart v. Brown*, 93 Am. Dec. 578, and note 579; *Skinner v. Shannon*, 38 Am. Rep. 232; *Blanchard v. Paschal*, 45 Id. 474; *Russell v. Lennon*, 20 Id. 60; *contra: Gaylord v. Imhoff*, 20 Id. 762; *White v. Heffner*, 31 Id. 238; *Spiro v. Paxton*, 31 Id. 630; *Wise v. Frey*, 29 Id. 380; *Giovanni v. First Nat. Bank*, 28 Id. 723; *State v. Spencer*, 27 Id. 244.

ONE PARTNER, BY CONSENT OF HIS COPARTNERS, MAY HAVE SEPARATE EXEMPTION out of partnership property seized on execution against the firm: *O'Gorman v. Fink*, 46 Am. Rep. 58.

EXEMPTION FROM EXECUTION OF PROPERTY OF PARTNERS AND CO-TENANTS, INCLUDING BOTH PERSONAL AND HOMESTEAD EXEMPTIONS. — Whether partners can, during the existence of the partnership, claim an individual exemption in the partnership property, when taken under legal process for partnership debts, is a question upon which there is a conflict of judicial opinion, and the cases are irreconcilable. The question is settled affirmatively in Michigan, according to the ruling in the principal case: See also *Chipman v. Kellogg*, 60 Mich. 438; and the same view is entertained by the courts in some of the other states. It is held that the exemption act should receive a liberal construction, in harmony with its humane and remedial purpose, and that its provisions extend to property owned by the debtor as a member of a copartnership: *Stewart v. Brown*, 37 N. Y. 350; 93 Am. Dec. 578; *Blanchard v. Paschal*, 68 Ga. 32; 45 Am. Rep. 474. Personal property which is exempt from forced sale on execution is none the less exempt because the judgment debtor owns an undivided interest in it in common with a stranger to the judgment: *Servanti v. Lusk*, 43 Cal. 238. And the decisions are numerous in support of the doctrine that one partner, by consent of his copartners, is entitled to have a personal property exemption allotted to him out of the partnership property before the partnership debts are paid: See *O'Gorman v. Fink*, 57 Wis. 649; 46 Am. Rep. 58; *Burns v. Harris*, 67 N. C. 140; *Till's Case*, 3 Neb. 261; *Allen v. Grissom*, 90 N. C. 90; and it is held to be immaterial that he has individual property sufficient to make up the exemption: *Scott v. Kenan*, 94 Id. 296. But although, in proper cases, each member of a partnership is entitled to his separate exemption out of the partnership property, yet the partnership as such, or the partners jointly, can claim no exemption: *Russell v. Lennon*, 39 Wis. 570; 20 Am. Rep. 60; overruling *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219; *McNair v. Rawey*, 62 Wis. 167. But one partner may acquire title to the partnership property by a purchase in good faith from the copartnership, and if the property purchased is such as is exempt under the statutes, he may hold it as against creditors of the copartnership: *Burton v. Baum*, 32 Kan. 641; *Levy v. Williams*, 79 Ala. 171; *Mortley v. Flanagan*, 38 Ohio St. 401. Partnership property of a firm which is insolvent cannot, however, be divided among the partners and then claimed under the exemption laws, so as to defeat the partnership creditor: *Gill v. Lattimore*, 9 Lea, 381; *Re Santhoff*, 8 Biss. 35.

In opposition to the doctrine of the principal case, and to that of many of the other cases above cited, the great weight of authority seems to favor the rule that partners cannot, during the continuance of the partnership, claim

an individual exemption in the partnership property; nor are partnerships, as such, entitled to any rights of exemption as against partnership creditors: *Giovani v. First Nat. Bank*, 55 Ala. 305; 28 Am. Rep. 723; overruling 51 Ala. 176; *Bonsall v. Cornly*, 44 Pa. St. 442; *Baker v. Sheehan*, 29 Minn. 235; *Prosser v. Hartley*, 35 Id. 340; *State v. Spencer*, 64 Mo. 355; 27 Am. Rep. 244; *Wise v. Frey*, 7 Neb. 134; 29 Am. Rep. 380; *Gaylord v. Imhoff*, 26 Ohio St. 317; 20 Am. Rep. 762; *White v. Heffner*, 30 La. Ann. 1280; 81 Am. Rep. 238; *In re Handlin*, 3 Dill. 290; *Pond v. Kimball*, 101 Mass. 105; *Guptil v. McFe*, 9 Kan. 30; *State v. Bowden*, 18 Fla. 17; *Richardson v. Adler*, 46 Ark. 43; and the rule is said to rest upon the principle, well recognized in the decisions, that the title and ownership of partnership property is in the partnership, and neither partner has any exclusive right to any part thereof: *Id.*; *Levy v. Williams*, 79 Ala. 171; *State v. Emmons*, 99 Ind. 452; *Ex parte Hopkins*, 104 Id. 157. So it is held that one partner cannot, either as against the creditors of the firm, or as against his copartners, acquire a homestead right in real estate belonging to the firm: *Drake v. Moore*, 66 Iowa, 58; *Hoyt v. Hoyt*, 69 Id. 174; and the right of homestead is denied upon the ground that the property must primarily be devoted to the payment of partnership liabilities, and that a partner has no interest in the property upon which a homestead can be based until the partnership debts are paid: *Troubridge v. Cross*, 117 Ill. 109; *Robertshaw v. Hanway*, 52 Miss. 713; and see *Hewitt v. Rankin*, 41 Iowa, 35, 44; *Terry v. Berry*, 13 Nev. 514; *Kingsley v. Kingsley*, 39 Cal. 666; *Chalfant v. Grant*, 3 Lea, 118; *Amphlett v. Hibbard*, 29 Mich. 298. And it is said of the California statute that it "did not contemplate that homesteads should be carved out of land held in joint tenancy, or tenancy in common, because it has not provided any mode for their separation and ascertainment": *Wolf v. Fleischacker*, 5 Cal. 244; approved in *Carroll v. Ellis*, 63 Id. 442; *Terry v. Berry*, 13 Nev. 514; *Lindley v. Davis*, 6 Mont. 453, 456; *West v. Ward*, 26 Wis. 579; and see *Holmes v. Winchester*, 138 Mass. 542.

But a different view is entertained in Texas: See *Clements v. Lacy*, 51 Tex. 150, 161, reviewing the earlier authorities. Under the peculiar and liberal system of exemptions of that state, it is held that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale; and that his occupation and use of such property as his place of business, with the consent of the other members, is such use of it as will effect the destination of his interest therein as homestead, and deprive his creditors, his copartners, and himself of the power, thereafter, to impose upon it any lien, except for purchase-money or for improvements: *Swearingen v. Bassett*, 65 Tex. 287; and see *Wheatley v. Griffin*, 60 Id. 209. So it is held in Georgia that a homestead in the undivided half of the real estate belonging to the firm may be set apart to the wife of one of the partners, and such homestead will be valid against general creditors of the firm: *Hunnicut v. Summey*, 63 Ga. 586; and see *Harris v. Viischer*, 57 Id. 229; *Newton v. Summey*, 59 Id. 397. But a tenant in common is not entitled to a right of homestead on the common property, to the prejudice of the rights of a co-tenant: *Clements v. Lacy*, 51 Tex. 150; *Lynch v. Lynch*, 18 Neb. 586.

Mere occupation of a homestead owned by one partner, for use in the partnership business, such use not being inconsistent with use as homestead, will not affect the homestead exemption, attached to the property before such use: *Smith v. Chenault*, 48 Tex. 455; and see *Griffie v. Mazey*, 58 Id. 210. And where two or more persons engage in business, each individually

owning a portion of the property used in the business, the only community of interest being in the profits, the property is not regarded as partnership property in such sense as to prevent the owners from claiming it as exempt from execution: *Root v. Gay*, 64 Iowa, 399.

CARPENTER v. RODGERS.

[61 MICHIGAN, 384.]

CONTRACT ENTERED INTO BY PARTY WHO IS SO DRUNK AS NOT TO KNOW WHAT HE IS DOING IS VOIDABLE ONLY, and not void, and may be ratified by such party when he becomes sober.

REPLEVIN. The opinion states the case.

Clapp and Bridgman, for the defendant and appellant.

O. W. Coolidge and E. L. Hamilton, for the plaintiff.

By Court, SHERWOOD, J. The parties in this case, on the second day of January, 1885, traded horses.

The plaintiff gave his team, and an order on Mr. Tuttle of Niles for five dollars, for the team of defendant.

The team obtained by the plaintiff proved to be of little value, unsound, and, as plaintiff claimed, not as represented; and that the defendant cheated and defrauded him out of his property by taking advantage of his inability when he was drunk in making the trade; and, claiming a rescission of the contract under which the trade was made, he brought replevin to obtain the team he let the defendant have on the exchange.

The property was taken upon the writ, and delivered by the sheriff to the plaintiff.

The cause was tried in the Berrien circuit before a jury, and the plaintiff prevailed.

On the trial, testimony was given tending to show that the plaintiff was a young man of weak and feeble mind, scarcely able to do any business requiring the exercise of ordinary judgment; and that he was intoxicated to the extent when he made the trade that he did not know what he was doing, or at least, have intelligent comprehension of the transaction; that the defendant was a horse-trader unknown to the plaintiff, and that the trade was brought about by one Allen, a neighbor of the plaintiff, and a friend of the defendant; that it was through Allen the intoxication of the plaintiff was procured; that the team of plaintiff was a pair of young horses, and

worth from \$150 to \$200; and that the defendant's team was not worth over \$75.

On the part of the defendant, these facts, or most of them, were controverted, and counsel for defendant denied there had ever been any rescission of the contract.

The court, in charging the jury, said upon the subject of rescission, and the condition of the plaintiff at the time the trade was made: "If he was so drunk that he did not know what he was about, the contract would be void, and so no rescission of the contract would be needed. He could replevy his property without any rescission, because there would be no contract to rescind."

This was error.

A contract entered into by a person who is so drunk as not to know what he is doing is voidable only, and not void, and may therefore be ratified by him when he becomes sober: Story on Sales, sec. 15; Benjamin on Sales, sec. 43; Bishop on Contracts, sec. 304; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Caulkins v. Fry*, 35 Conn. 170; *Foss v. Hildreth*, 10 Allen, 76-79; *Van Wyck v. Brasher*, 81 N. Y. 260; *Warnock v. Campbell*, 25 N. J. Eq. 485; *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441; *Noel v. Karper*, 53 Pa. St. 97; *Dulany v. Green*, 4 Harr. (Del.) 285; *Cummings v. Henry*, 10 Ind. 109; *Cory v. Cory*, 1 Ves. Sr. 19; *Pitt v. Smith*, 3 Camp. 33; *Newell v. Fisher*, 11 Smedes & M. 431; 49 Am. Dec. 66; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Menkins v. Lightner*, 18 Ill. 282; *Taylor v. Patrick*, 1 Bibb, 168; *Broadwater v. Darne*, 10 Mo. 277; *Hutchinson v. Brown*, 1 Clarke Ch. 408; Story on Contracts, 27, 28; Chitty on Contracts, 153, 154.

Without passing upon the facts whether or not the plaintiff's testimony showed a rescission, or what the jury would have been warranted in finding upon that subject under a proper charge by the court, we can only say, upon the record as presented, it was necessary for the plaintiff to show a rescission of some kind before he could maintain his suit, and the court should have so charged the jury.

We find no other error in the case. The judgment must be reversed, and new trial granted.

INTOXICATION AS GROUND FOR AVOIDING CONTRACT: See *Reynolds v. Dechaums*, 76 Am. Dec. 101, and cases collected in note 105; *Joest v. Williams*, 18 Am. Rep. 377, and note 381; *Holland v. Barnes*, 25 Id. 595; *Bush v. Breinig*, 57 Id. 469.

WILL MADE BY ONE THEN UNDER INFLUENCE OF INTOXICATING LIQUORS IS NOT FOR THAT REASON VOID, unless he was so excited by the liquor as to disorder his faculties and pervert his judgment: *Peck v. Cary*, 84 Am. Dec. 220, and see note 240.

DRUNKENNESS OF MAKER OF NEGOTIABLE PROMISSORY NOTE CANNOT BE SET UP AS DEFENSE against an innocent holder for value: *State Bank v. McCoy*, 8 Am. Rep. 246, and note 251; *Miller v. Finley*, 12 Id. 306.

WOOD v. CALLAGHAN.

[61 MICHIGAN, 402.]

IN CASE OF PROTEST OF NOTE, COMMERCIAL USAGE ONLY REQUIRES NOTICE TO BE GIVEN TO IMMEDIATE INDORSER, by the indorsee making demand of payment. It is not necessary for the notary to take any notice of the residence of the maker being upon the note, or to make any inquiry as to the residence of any of the indorsers, except the last. Such a rule would greatly embarrass and obstruct business, and is not required by the authorities.

STREET LETTER-BOXES AND STREET DELIVERY ARE LEGAL PART OF POST-OFFICE SYSTEM, and a letter deposited in one of these boxes must be considered as being delivered or mailed at the post-office.

HOLDER OF SEVERAL UNPAID NOTES, SOME SECURED AND OTHERS UNSECURED, MAY, IN ABSENCE OF ANY AGREEMENT or direction as to the application of payment, apply the money exclusively to the payment of any one of the notes, and is not bound to a *pro rata* application of it.

ASSUMPSIT. The facts appear in the opinion.

Conely, Maybury, and Lucking, for the defendant and appellant.

James T. Keena, and John Atkinson, and Isaac Marston, for the plaintiffs.

By Court, MORSE, J. This cause was tried in the superior court of the city of Detroit, without a jury, and judgment rendered for the plaintiffs.

The facts as found by Judge Chipman, so far as it is necessary to consider them to determine the questions raised in this court, are substantially as follows:—

The plaintiffs reside in Louisville, Kentucky, and are co-partners under the name of Alvin Wood & Co.

The defendant, Callaghan, resides in the city of Detroit, and has resided there since the sixteenth day of June, 1884, at least. On that day he sold a stock of groceries, and fixtures and furniture, in his store in Detroit to the defendant, David Pennock, and received in part payment thereof six promissory

notes, in all amounting to two thousand eight hundred dollars.

The first four of said notes were each for \$466.67, and the last two of them for \$466.66 each. They were dated on the first days of July, August, September, October, November, and December, respectively, and each made payable in one month after date, payable to the order of Callaghan at the People's Savings Bank in Detroit. Each was signed by David Pennock, and indorsed by Homer Pennock at the time Callaghan received them.

The payment of these notes was secured by a chattel mortgage, dated June 16, 1884, executed by David Pennock to Callaghan, and covering the stock of goods sold by him to Pennock, which mortgage stated the location of said goods to be at No. 266 Howard Street, Detroit. The notes dated July 1st and August 1st were paid to Callaghan at maturity.

The defendant, Callaghan, bought goods of plaintiffs, and in part payment therefor gave them the three notes dated October 1st, November 1st, and December 1st. The note dated September 1st he retained, and it was paid to him when due. Of the notes sent by him to plaintiffs, the two dated October 1st and November 1st he indorsed without recourse; and the one dated December 1st he indorsed in blank, which is the note sued for and declared upon in this case.

The chattel mortgage, upon its execution, was filed in the office of the city clerk in Detroit, where it remained. It does not appear that it was ever assigned to plaintiffs.

October 31, 1884, David Pennock gave a bill of sale of the goods covered by the mortgage to Marcus A. Chase, who knew of the mortgage. November 7, 1884, Chase sold the goods for five hundred dollars to one Gross. Gross paid sixty dollars in money, and gave his note, with Callaghan as joint signer, for the balance. Gross ran the business a short time, and then sold the stock to the wife of Callaghan. January 23, 1885, Callaghan paid Chase upon the Gross note \$16.50, which Chase indorsed, and then transferred the balance of the note to plaintiffs, indorsing it without recourse.

January 24, 1885, Callaghan paid the balance of this Gross note to them, the amount being \$423.50. At this time the three notes of which David Pennock was maker and Callaghan indorser in the hands of the plaintiffs were unpaid, and were the only notes not paid. They then amounted, respectively, principal and interest, to the following sums: \$474.20,

\$471.47, and \$468.75. No other payment has been made upon any of them.

Prior to the maturity of the note sued upon it was indorsed by the plaintiffs to the Farmers' and Drovers' Bank of Louisville, Kentucky, and by that bank to the Detroit National Bank.

On the third day of January, 1885, William T. De Graff presented the note to the People's Savings Bank for payment, and made his certificate of protest. He filled out four notices of protest, directed, respectively, to the Farmers' and Drovers' Bank aforesaid, to the plaintiffs, John Callaghan, and Homer Pennock. The address of the first was Louisville, Kentucky. The others were without any place or address. These notices were sent under cover of one envelope, directed properly to the Farmers' and Drovers' Bank. This envelope was deposited in the Detroit post-office on the evening of Saturday, January 3, 1885, between eight and nine o'clock, after the last mail for that day for Louisville had left the post-office. It went by the next mail, Sunday eve, which, if on time, would have reached Louisville Monday at 1 o'clock P. M.

There was then a regular carrier delivery in Louisville, one about 7:30 in the morning, another between 10 and 11 o'clock A. M., a third between 1 and 2 o'clock P. M., and a fourth between 3 and 4 in the afternoon. This letter, arriving at 1 P. M., would not be delivered until between 3 and 4 P. M.

The Louisville bank closes its doors at 3 o'clock, so that no delivery could be made to said bank by carrier after 3 o'clock in the afternoon. The notices were delivered to the said bank on the morning of the 6th. Said bank that day mailed all said notices, except the one directed to itself, to Alvin Wood & Co., who received them on the same day about 11 o'clock in the morning; and that plaintiffs, about 3 o'clock in the afternoon of that day, deposited in a "letter-box," erected and maintained by the United States post-office or mail department, at the said city of Louisville, and postage prepaid, an envelope directed as follows: "John Callaghan, Esq., Detroit, Mich., cor. 8th and Howard"; and that letters and all mail matter deposited in said box were regularly taken therefrom at least three times a day by carriers in the employ of said post-office department. Said envelope so directed to said defendant reached said post-office at said city of Louisville at 11 o'clock in the morning of Wednesday, January 7, 1885. On said envelope there were printed the words: "If not called for in

ten days, return to Alvin Wood & Co., Distillers Pure Kentucky Whiskies, S. E. cor. First and Main Sts., Louisville, Ky."

In said envelope was the notice heretofore mentioned as having been directed to John Callaghan, and it is the same notice sent by De Graff to the Farmers' and Drovers' Bank, Louisville, Kentucky, under cover. No notice, or letter, or other writing, was sent to said Callaghan, but across the face of the notice sent there were written in pencil the words, "Sent to us through mistake." Said envelope so directed to said John Callaghan was received at the Detroit post-office on the eighth day of January, A. D. 1885, at ten o'clock in the morning, the regular and usual time for the mails to go from Louisville to Detroit. Said envelope so directed to said John Callaghan, and inclosing said notice, was delivered to said Callaghan in the afternoon of January 8, 1885, by the carrier. At the time of its receipt by Callaghan it had across it the words heretofore mentioned, "Sent to us through mistake."

At the time of the taking of said note by said Alvin Wood & Co., they knew, and ever since have known, that said Callaghan resided at the corner of Eighth and Howard streets, in said city of Detroit; that when the notary demanded payment and mailed the notices, he did not know where Callaghan's residence was, nor did he make any inquiry, or look into the city directory for the same; Callaghan's name and address were in the directory.

Upon these facts the circuit judge concluded, as matter of law, that the plaintiffs were entitled to recover, and rendered judgment accordingly for the full amount of the note and interest.

The defendant brings error, and insists that he did not receive due notice of the dishonor of the note, and was thereby discharged from his liability as indorser.

He claims that the notary should have made inquiry for the residence of Callaghan, or looked in the directory, either of which would have given him information that he lived on the corner of Eighth and Howard streets, in Detroit; that, the maker and indorser both living in Detroit, the notice could not be transmitted to the Louisville bank without inquiry; and that, granting it could be so sent, it was the duty of plaintiffs to have mailed it to Callaghan by the first mail, which they did not do; that the notice should have been delivered by them at the general post-office, and not deposited in a street letter-box, which caused a delay of a day; and

that the pencil writing upon the back of said notice, "Sent to us through mistake," was in fact a notice to Callaghan that plaintiffs did not intend to hold him upon the note.

The manner of sending the notices was according to commercial usage, and the Detroit National Bank was only required to give notice to its immediate indorser, the Louisville bank. We do not deem it necessary for the notary, in a case like the present, to take any notice of the residence of the maker being upon the note, or to make any inquiry as to the residence of any of the indorsers except the last. Such a rule would greatly embarrass and obstruct business, and is not required by the authorities: *Story on Bills*, secs. 326, 331, 419, 426; *Bayley on Bills*, 2d Am. ed., 275; *Wamesit Bank v. Buttrick*, 11 Gray, 387; *Eagle Bank v. Hathaway*, 5 Met. 212; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Warren v. Gilman*, 17 Me. 360.

After the transmission of the notices from Detroit, due diligence was exercised by all parties. The Louisville bank delivered the notices to the plaintiffs on the same day they received them, January 6th, and plaintiffs mailed the notice to defendant the same day. The delay was in the post-office department, and not in the Louisville bank or the plaintiffs. The street boxes and street delivery are a legal part of the post-office system, and a letter deposited in one of these must be considered as being delivered at the post-office: *Abbott on Trial Evidence*, 433, 434; *Greenwich Bank v. De Groot*, 7 Hun, 210; *Pearce v. Langfit*, 101 Pa. St. 507; 47 Am. Rep. 737.

There were no laches on the part of plaintiffs, nor can the fact that they indorsed the notice as they did have any effect upon defendant's liability. The sending of the notice to him was not necessary, if, as defendant claims, the plaintiffs wished to release him. Instead of its being a notice to him that they did not look to him for a payment of the note, as argued by defendant's counsel, we think it evidenced a desire on their part to hold him, which they are attempting to do in this suit.

The counsel for defendant also claim that the chattel mortgage was a security equally for all the notes, and that the proceeds of it could not be all indorsed upon one note, but should at least have been applied *pro rata* upon the three then in plaintiffs' hands. He also argues that the defendant indorsing two of the notes without recourse, and this one in blank, it was intended by him that the chattel mortgage should stand as security for the note upon which he might be held.

At the time the money was realized from the chattel mortgage and paid to plaintiffs, they owned all the unpaid notes to which the mortgage was collateral; and in the absence of any agreement with Callaghan, at the time they took the notes or subsequently, could apply the proceeds of the security as they saw fit upon one or all of these notes. There was no agreement between them and Callaghan about it, and his signing the notes as he did left the plaintiffs, outside of the mortgage, with two notes with only the Pennocks liable upon them, and this note in suit with the additional security of Callaghan's name. They then stood, when they received the money derived from the mortgage security, in the well-known relation of a creditor having a secured and an unsecured debt. The chattel-mortgage payment was the payment of the maker who gave it, and no direction being given as to the application of the payment by the debtor, or by Callaghan, who sent it, the plaintiffs had an undoubted right to apply it upon the unsecured first note, which they did.

Callaghan has no equity which entitles him to a *pro rata* application of the money. He had recovered his pay in full upon the notes retained by him; and when he indorsed this note in blank there is nothing to show that he did so in reference to this mortgage, or in dependence upon its contributing to pay it. The only reasonable inference to be drawn from the notes being taken by plaintiffs as they were, to my mind, is, that they and Callaghan both supposed that the chattel-mortgage security would not liquidate more than the first two of them; and in view of that fact the indorsement of Callaghan was required and given upon the last. In fact, it did not pay the whole of the first note: *Brandt on Suretyship*, sec. 286; *Mathews v. Switzler*, 46 Mo. 301-303.

It must be remembered, also, that Callaghan was not paying Pennock's debt to the plaintiffs, but a debt of his own, for which he had turned out the paper of Pennock in payment.

We find no error in the proceedings, and the judgment is affirmed, with costs.

NOTARY'S CERTIFICATE OF NOTICE OF DISHONOR, WHEN DEFECTIVE: See *Slocumb v. De Liardi*, 99 Am. Dec. 740.

NOTICE OF PROTEST BY MAIL, SUFFICIENCY OF: *Shoemaker v. Mechanic's Bank*, 98 Am. Dec. 315, and note 317; *Pearce v. Langfit*, 47 Am. Rep. 737; *Seaton v. Scovill*, 26 Id. 779; *Central Nat. Bank v. Adams*, 32 Id. 495; *Smith v. Pollon*, 41 Id. 402; *First Nat. Bank v. Wood*, 31 Id. 692; *Van Brunt v. Vaughn*, 29 Id. 468; *Forbes v. Omaha Nat. Bank*, 35 Id. 480; *Davey v. Jones*, 37 Id. 505; *Carolina Nat. Bank v. Wallace*, 36 Id. 694.

NOTICE OF PROTEST MUST BE GIVEN TO INDORSER ALTHOUGH HE HAS MADE a general assignment for the benefit of creditors: *House v. Vinton Nat. Bank*, 54 Am. Rep. 813. Compare *Id.* 818, note.

APPLICATION OF PAYMENTS CANNOT BE MADE TO ILLEGAL CLAIM: *Bachman v. Wright*, 65 Am. Dec. 187, and cases collected in note 190.

RULE AS TO APPLICATION OF PAYMENTS: *Pickering v. Day*, 95 Am. Dec. 291, and note 313; *Hersey v. Bennett*, 41 Am. Rep. 271.

CREDITOR RECEIVING PAYMENTS WITHOUT DIRECTION AS TO APPLICATION MAY APPLY THEM TO ANY DEBT NOT ILLEGAL, even if it would not support an action; as, for instance, a debt on which no action would lie by reason of the statute of frauds: *Haynes v. Nice*, 1 Am. Rep. 109.

PEARL v. GARLOCK.

[61 MICHIGAN, 419.]

REPLEVIN, PROOF OF OWNERSHIP OF PROPERTY. — A replevin suit was discontinued by the plaintiff, the defendant took judgment for a return of the property, and issued an execution, which was returned unsatisfied. In a suit on the replevin bond for failure to return, *held*, that the defendants were entitled to show that the principal defendant (plaintiff in the replevin suit), was the owner of the property at the time it was replevied, and was still such owner.

WHERE JUDGMENT IN REPLEVIN HAS BEEN RENDERED ON WAIVER OF RETURN for the value of the property, all proper questions must be litigated on the assessment of damages, and are not afterwards open.

REPLEVIN IS POSSESSORY ACTION, and does not necessarily determine title.

It may fail either because the plaintiff shows no right of possession, or because the defendant is shown not to have wrongfully withheld; and it may fail for lack of demand in some cases, as well as for lack of substantial right.

JUDGMENT IN REPLEVIN, WHERE THERE IS NO ASSESSMENT OF DAMAGES MERELY DETERMINES the right of possession at the time, and is not inconsistent with the right of the party defeated to recover it back afterwards under a change of circumstances.

DEFENDANT IN REPLEVIN SHOULD, UPON REPLEVIN BOND, RECOVER NO MORE than his legal damages, which depend upon the nature of his right to the property, or the character in which he held it. If he had merely a possessory or partial interest in the property, and was in no position to hold the entire interest for some one else, then he should not recover the full value

ACTION on replevin bond. The opinion states the case.

H. J. Patterson, for the defendants and appellants.

Cook and Daboll, for the plaintiff.

By Court, CAMPBELL, C. J. Pearl, as assignee of Henry Stark, sued defendants on a replevin bond given to Stark, as defendant, in a suit brought by Eldorus Garlock for a horse.

The suit having been discontinued, Stark took judgment for a return, and issued an execution, which was returned unsatisfied. Stark assigned all his interest to Pearl.

Upon the trial of the suit upon the bond, defendants, by way of defense, offered to show that Eldorus Garlock, the principal defendant, was the owner of the horse. The court refused to admit this testimony, and held that the title to the horse was settled in the replevin suit, and plaintiff was entitled to a judgment for its full value, which was assessed by the jury at forty-five dollars.

The court also refused to submit to the jury a question whether the horse was owned by Stephen Pearl when he took it away from Garlock; but as there is nothing in the record to show how this question came into the case, while it may have been important, it is not shown to be so, and we cannot hold the refusal erroneous.

We think the court erred in ruling out the testimony of ownership. It has been held several times that where a judgment has been rendered on waiver of return for the value of the property, all proper questions must be litigated on the assessment of damages, and are not afterwards open: *Williams v. Vail*, 9 Mich. 162; 80 Am. Dec. 76; *Ryan v. Akeley*, 42 Mich. 516. And so, when a third person, without any interest of his own, replevies from an officer, and return is awarded, the latter may sometimes, if not always, have judgment for the entire value, and may become entitled to hold it for the parties in interest: *First Nat. Bank v. Crowley*, 24 Id. 492. And a defendant in replevin, from whom property is unlawfully replevied, may have a claim for damages on similar principles, even though not personally owning the property: *Burke v. Burke*, 34 Id. 451.

But in the present case the record does not show by what right Stark was, or claimed to be, in possession of the property when replevied from him. He may or may not have been in a position to have the full value of the horse, or the horse itself, restored to him. His damages for non-return must have depended upon the nature of the right which he possessed, or the character in which he held it.

An action of replevin does not necessarily determine title. It is a possessory action, and may fail either because the plaintiff shows no right of possession, or because the defendant is not shown to have wrongfully withheld it. It may fail for lack of demand in some cases, as well as for lack of sub-

stantial right. In *Deyoe v. Jamison*, 33 Mich. 94, it was held that a judgment in replevin, where there is no assessment of damages, merely determines the right of possession at the time, and is not inconsistent with the right of the party defeated to recover it back afterwards under change of circumstances. In that case a vendor, upon a partial default of payment, recovered possession of the property sold, on which he retained a lien. Afterwards, upon tender of the debt, it was held the vendees could replevy it back. Had Stark got back the horse on his judgment of return, there is nothing in the record to show that Garlock could have had no right to reclaim the animal on some conditions; and if owner, he probably would have had.

There is no reason why the defendant in replevin should, upon the replevin bond, recover any more than his legal damages. If he had merely a possessory or partial interest in the horse, and was in no position to hold the entire interest for some one else, then he should not recover the full value. The offer to show ownership was entirely proper. The court excluded it on the ground that, by the judgment for return, it was determined that Stark owned the horse. This was not the effect of the judgment. That merely found that plaintiff had no right to seize the horse on replevin from Stark at the time and in the manner shown. We have no means of knowing under what circumstances this was done. We think the relative rights of both parties could be examined, and while some recovery should be had upon the bond, its extent must be measured by the facts to be shown.

The judgment must be reversed, and a new trial granted.

PERSON HAVING NEITHER POSSESSION NOR RIGHT OF POSSESSION cannot maintain replevin: *Berthold v. Fox*, 97 Am. Dec. 243, and cases in note 247.

REPLEVIN, MEASURE OF DAMAGES IN ACTION OF: *Herdie v. Young*, 93 Am. Dec. 739, and note 744; *Berthold v. Fox*, 97 Id. 243; *Yandle v. Kingsbury*, 22 Am. Rep. 282, and note 284; *Allen v. Fox*, 10 Id. 641; *Washington Ice Co. v. Webster*, 16 Id. 462.

WHERE ANSWER IN REPLEVIN DOES NOT DENY VALUE OF PROPERTY ALLEGED IN COMPLAINT, evidence as to its value should not be admitted: *Tully v. Harloe*, 95 Am. Dec. 102.

CARSTENS v. HANSELMAN.

[61 MICHIGAN, 425.]

WIFE WHO HAS BEEN DESERTED BY HUSBAND MAY MAKE BINDING CONTRACT FOR MEDICAL SERVICES. Such services are regarded in law as "necessaries," the same as food and clothing.

MARRIED WOMEN HAVE NOT GENERAL POWER UNDER MICHIGAN STATUTE TO MAKE AGREEMENTS of all kinds, but they must necessarily be able to make contracts concerning what it is essential for their safety and security to procure.

HUSBAND WHO DESERTS HIS FAMILY, AND DOES NOTHING FOR THEIR SUPPORT, may be regarded as refusing to perform the contracts of his wife for necessities, within the meaning of a statute which makes a wife liable to be sued upon any contract on which her husband is not liable, or where he refuses to perform it.

IT IS NOT COMPETENT TO ALLOW JURY TO DETERMINE FOR ITSELF whether physician's course has been proper or improper in the treatment of a fractured limb; and it is not error to refuse the jury permission to inspect the limb for that purpose.

ASSUMPSIT. The opinion states the case.

William L. January and S. Larned, for the defendant and appellant.

John G. Hawley, for the plaintiff.

By Court, CAMPBELL, C. J. Plaintiff sued and recovered below for medical services rendered to defendant in the care and treatment of a fractured leg. It was defended on the double ground of improper treatment and of defendant's disability to contract. The question concerning the quality of plaintiff's services was submitted to the jury, and no error is assigned on it. The capacity of defendant to contract is the main question in the case. The evidence of contract relations was sufficient, if she was capable of binding herself.

She was a married woman when the accident happened which disabled her. Her husband had abandoned her nine or ten years before. She supported herself by her own exertions.

That the medical services rendered were in a proper sense necessities cannot be questioned. As such, it is possible the husband might be responsible. But he was entirely unknown in this transaction, and was not referred to by any one; and plaintiff had never heard or supposed there was such a person. Our statutes, before we had any law enlarging the business rights of married women, contained liberal provisions to enable women who were deserted to act for themselves. Since

their rights have been put under their own control, they have had general power to contract concerning their own property, and have been authorized to sue singly for all causes of action, and to be sued separately for all their torts. Their power to make any kind of purchases on their own credit has been fully recognized: *Paul v. Roberts*, 50 Mich. 611; *Campbell v. White*, 22 Id. 178. And while they have not a general power to make agreements of all kinds, we think they must necessarily be able to make contracts concerning what it is essential for their safety and security for them to procure. Section 6298 of Howell's Statutes makes a wife liable to be sued upon any contract on which her husband is not liable, or where he refuses to perform it.

Where a husband utterly deserts his wife, it would be a cruel rule for her, if she cannot, in his absence, at least, or in his presence, if he does not himself provide for her, make a binding agreement for any necessary, whether articles to be purchased or professional help, without becoming a public charge. It is not to be expected that physicians and surgeons will always feel bound to render gratuitous treatment to injured persons, and when the occasion is pressing, it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them. It seems to us that no sensible line can be drawn between contracts for food and clothing and contracts for medical aid. It is not going out of the way to regard a husband who deserts his family, and does nothing for their support, as refusing to perform the contracts of his wife for necessities. Such stubborn and willful neglect is treated as equivalent to a refusal,—in most cases, of dereliction of duty; and there is no reason for making an exception in such a case as this. We think the contract was binding.

Error is assigned because the court refused to allow defendant to exhibit her injured limb to the jury. The injury occurred several years before, and there was testimony concerning the correctness of the treatment, which necessarily involved medical questions which no jury could be supposed to fully comprehend. It is not competent to allow juries to determine for themselves whether a physician's course has been proper or improper in the treatment of a fractured limb; and the court very properly refused to permit them to inspect

it for that purpose. No inspection after an injury is healed apart from some knowledge of the character of the injury and the method of treatment, could enable even a medical expert to decide upon the merits or demerits of the attending surgeon. A jury's guessing from such an inspection would be of no value whatever, and any needless exposure would have been, as the court below properly held, improper, if not indecent.

There is no error in the record, and the judgment must be affirmed.

UNDER MICHIGAN STATUTES, MARRIED WOMAN HAS ALL POWERS OF FEME SOLE with reference to her separate property: *Ring v. Burt*, 97 Am. Dec. 200.

LIABILITY OF MARRIED WOMAN ON HER CONTRACT FOR NECESSARIES FOR HERSELF AND FAMILY: *Priest v. Cone*, 31 Am. Rep. 695; *Tiemeyer v. Twaquist*, 39 Id. 674; *Wilson v. Herbert*, 32 Id. 243; *Kronskop v. Shontz*, 37 Id. 817; *Sherwin v. Sanders*, 59 Id. 750.

CONTRACT BY MARRIED WOMAN TO PAY ATTORNEY'S FEES, WHEN BINDING: *Porter v. Haley*, 30 Am. Rep. 502; when not binding: *Musick v. Dodson*, 43 Id. 780.

NOTE GIVEN BY DESERTED WIFE, WHILE LIVING APART FROM HUSBAND, FOR NECESSARIES USED BY HER in her own support, is void in Vermont; and her promise to pay it, made after her divorce and before her marriage, is without consideration and invalid: *Hayward v. Barker*, 36 Am. Rep. 762.

DEGREE OF SKILL REQUIRED OF PHYSICIAN, AND HOW TO BE JUDGED: See *Leighton v. Sargent*, 64 Am. Dec. 323, and note 329; *Holtzman v. Hoy*, 59 Am. Rep. 390.

SEPARATE ESTATE OF MARRIED WOMAN IS LIABLE FOR BILL OF PHYSICIAN CALLED BY HER IN HER LAST SICKNESS, and for the funeral expenses: *McClellan v. Filson*, 58 Am. Rep. 814.

ROSS v. LEGGETT.

[61 MICHIGAN, 445.]

IN MICHIGAN, NO ARREST CAN BE MADE FOR MISDEMEANOR, UNLESS BY WARRANT, upon complaint duly made, or by an officer or by-stander who actually sees the offense which constitutes the misdemeanor.

ACTUAL DAMAGES ARE THOSE WHICH INJURED PARTY IS ENTITLED TO RECOVER FOR WRONGS RECEIVED and injuries done when none were intended. Where the injuries and sufferings were intended or occur through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse, further damages, which have been variously termed "exemplary," "punitive," "vindictive," "compensatory," or "added" damages, may be given, agreeably to what would be right and just under the circumstances of each particular case.

CASE. The facts appear in the opinion.

Charles M. Swift and Otto Kirchner, for the defendant and appellant.

Charles B. Howell and Don M. Dickinson, for the plaintiff.

By Court, SHERWOOD, J. The defendant in this case was president of the Brush Electric Light Company, and had obtained from the city of Detroit the contract for lighting the city at night, by electricity displayed from towers.

By its contract with the city, it was authorized to erect suitable towers for that purpose, and to anchor them, by means of guys, within the streets of the city. In so doing, and for the purpose of anchoring one of its light-towers, under the direction of the defendant, the company planted one of its guy-posts, from eight to ten feet high, and about nine inches in diameter, in the street lawn, on the south side of Joy Street, in front of the residence of the plaintiff, which was located at the southeast corner of Joy Street and Third Avenue.

The post was placed in the lawn, which was used for shade trees and ornamental purposes, about midway between the curb and sidewalk, a little one side of the walk leading from the plaintiff's yard to the carriage block, on Joy Street.

The plaintiff protested against the use of his street lawn for such purpose, and forbade the defendant setting the guy-post therein. His remonstrances were unheeded, and the post was placed in the lawn.

The plaintiff was offering his house and lot for sale at the time, and considered the use made of his premises by the company a damage to the property of at least five hundred dollars.

When the plaintiff learned of the intention of the defendant to thus mar the beauty of his lawn, he took counsel of an attorney as to the right of the company to thus appropriate the use of his property, and was informed that the planting of the post in his lawn was without authority, and that he had the legal right to remove the same. Acting upon advice thus received, after the post was set, and the guy-line was attached thereto, he took a saw and cut into the post about four inches.

A short time thereafter the defendant came to his house, and demanded that plaintiff should pay him six dollars for

the post, and setting the same, and informed him that he had ordered his arrest, and that an officer would be there in a few moments for that purpose. The officer soon came, and, as the plaintiff claims, at the instance of the defendant, arrested him, in the presence of his wife and children, and took him to the residence of the superintendent of police; and after detaining him there about twenty minutes, without any complaint having been made or warrant issued (it then being between eight and nine o'clock in the evening), the officer, accompanied by the defendant a portion of the way, took him to the Fremont Street station, and there searched him, and took from him his watch, some keys, a pocket-knife, and his money; and then locked him into a station cell, eight by ten feet, built of stone, and lined with iron, with a stone floor, and furnished with no bed or furniture, except two wooden benches about sixteen inches wide, extending the length of the cell.

That in this condition he was imprisoned throughout the night, and until about nine o'clock the next morning, when he was taken from the cell, and, accompanied by an officer, through the street to a police office, and there kept until about half-past eleven o'clock, when the defendant appeared, and made a complaint against him for willfully and maliciously injuring "personal property of the Brush light company, to wit, one guy-post," on the twelfth day of August, 1884, "to the damage of six dollars"; and after detaining him there until about twelve o'clock, the police justice discharged him upon his own recognizance, he declining to plead until he could see his counsel. What further was done with the plaintiff in the police court does not appear from the record, although we are informed by the brief of one of the counsel that the case against him was subsequently heard, and the plaintiff was discharged.

The plaintiff, feeling himself greatly aggrieved and injured in the premises, brought this suit against the defendant in the superior court of Detroit, alleging as his cause of action his wrongful detention and imprisonment, "whereby he was greatly injured in name and credit, and suffered great pain and mortification and disgrace, to his damage twenty thousand dollars."

The defendant pleaded the general issue, and gave notice that he would show on the trial thereunder "that the plaintiff willfully and maliciously and feloniously did destroy and injure the personal property of the Brush Electric Light Com-

pany, to wit, one wooden post, which was there used to support the guy-lines pertaining to a tower, the property of said company, contrary to the statute in that behalf made and provided, and against the peace and dignity of the people of the state of Michigan"; and further gave notice that he would show "that he had reasonable and probable cause to believe that plaintiff was and had been guilty of willfully, maliciously, and feloniously destroying and injuring the said guy-post, as above set forth."

The cause was tried before Judge Chipman, by jury, and a verdict obtained for four thousand five hundred dollars against the defendant, who now brings error.

The record contains all the testimony taken in the case upon the trial, and the charge of the court in full.

Twenty-seven errors are assigned, and most of them relied upon for reversal. Six relate to the decisions of the court overruling defendant's objection to testimony offered by counsel for plaintiff; one to the ruling of the court in sustaining the objection of plaintiff's counsel to a question put upon cross-examination. We have carefully examined the exceptions upon which these assignments are based, and are satisfied none of them are well taken.

Of the remaining errors assigned, eleven are to the refusals of the court to charge as requested, and nine relate to exceptions taken to as many different portions of the charge of the court. An examination of the requests and the charge shows several of the defendant's requests were given by the court. The remainder were properly refused.

The exceptions needing most consideration are those relating to the charge on the question of damages. The able briefs of counsel on both sides have been carefully reviewed, and the authorities consulted, but we are unable to concur in the conclusions reached by the learned counsel for the defendant.

The court, in his charge to the jury, assumed that defendant had the right to plant the post in the lawn where he did, so that if there was any doubt or question upon that subject the charge was in the defendant's favor, and it is unnecessary to discuss that question here.

It is not questioned or disputed that the arrest was made without any warrant or other process being issued for that purpose, and whether or not it was made by direction of the

defendant was properly submitted to the jury, and they found against the defendant.

The court further charged the jury that if the plaintiff was guilty of any offense in cutting the post, he was not guilty of felony, but of a misdemeanor. "That no arrest can be made for a misdemeanor unless by warrant, upon complaint duly made, or by an officer or by-stander who actually sees the offense which constitutes the misdemeanor. In the case of felony it is different. There, upon proper information,—such information as would justify a reasonable man in acting upon it,—an arrest may be made without warrant, and by one who does not see the actual commission of the offense. For the purposes of this case, I instruct you that the arrest, if an arrest was made, being without warrant, was an illegal arrest. . . . The law of the land, under the circumstances of this case, demanded a warrant, . . . because, if made at all, it was made by a party who did not see the commission of the misdemeanor, and therefore had no authority to make the arrest."

We think these instructions stated the law applicable to the case correctly. The facts upon which they were based were substantially undisputed, and we do not think the offense, if any was committed, was anything more than a misdemeanor, if all the testimony given upon this point is to be taken as true: 2 Cooley's Bla. Com. 243; 4 Bla. Com. 244; 2 Bishop on Criminal Law, sec. 1000; *Black v. State*, 2 Md. 376; *State v. Beekman*, 27 N. J. L. 124; 72 Am. Dec. 352; *Hanway v. Boulbee*, 4 Car. & P. 350; *Rex v. Bright*, 4 Id. 387; *People v. Smith*, 5 Cow. 258, note 5; *Rex v. Powell*, 2 Barn. & Adol. 75.

Upon the subject of damages, the court charged the jury: "There are two kinds of damages,—the law has divided them into two classes. . . . In the first place, there are what are called 'actual' damages. Then there are what are called 'vindictive' or 'punitive' damages, or what our own supreme court calls 'added' damages, for want of a better name. Actual damages are such compensation for the injury as would follow from the nature and character of the act. Actual damages, in this case, would be compensation for such injuries as would fall upon any man who underwent the same treatment which Mr. Ross is shown to have undergone in this case. What are those damages? What are the elements? There is the pain and suffering which any man would be sup-

posed—which the average citizen would be supposed—to suffer under those circumstances. There is being shut up,—the physical discomfort. There is the sense of shame, mortification, wrong, and outrage. All these matters enter into the actual damages.

“You are to view Mr. Ross as you would any other man in that regard. You are to be guided in that matter by your common sense, because there is no other rule,—there is no other way of getting at it. Your common sense is to determine what naturally and inevitably would be the suffering of the average citizen under such circumstances; because the law will not allow your feelings to be harrowed, will not allow you to be put to shame and mortification. In the eye of the law, those attributes of manhood,—those sentiments, those sensitivenesses, so to speak,—which come from the better quality of our nature, are matters which are not to be trifled with, any more than a man’s bones or his flesh. All these things the law considers precious. All these things the law considers as subjects of injury, and for injuries of this kind the law gives compensation.

“What would the average man naturally suffer, under those circumstances, from this imprisonment,—from what took place,—from what Mr. Ross was subjected to that night? What the average man would suffer under those circumstances would be the actual damage. But beyond actual damages, the law gives what are called ‘added’ damages. Those grow out of the wantonness or atrocity, so to speak, of the act. Those are given where an act is so wanton, so despotic, of so oppressive a character, or where it entails such shame, such publicity upon a party, as to have the effect of exciting his feelings more than an act committed under less wanton, less oppressive circumstances. In such cases, the law says the damages should be greater because the injury to the feelings is greater.

“Now, is that the case here? The actual damages nothing can mitigate. That which a man has actually suffered nothing can mitigate. But these ‘added’ damages, as they are called, may be mitigated by all the surroundings of the case. Is this a case for these added damages,—these punitive, exemplary damages,—in addition to the actual damages? That is for you to determine. All the circumstances of the act are to be taken into consideration.

“If you consider, under the explanation I have given you,

that this a case for these added, exemplary damages,—these damages over and beyond the actual damages,—then your next question will be, whether there is anything to mitigate it; whether there was anything in the conduct of Mr. Ross to excite Mr. Leggett to anger; whether Mr. Leggett, under the circumstances, had a right to be angry; whether, if angry, Mr. Ross's conduct naturally provoked it; whether Mr. Ross did anything to bring the injury upon himself, in the respect that he naturally excited, angered, and provoked Mr. Leggett. That is for you entirely. If you think the case is one for these added or extra damages, are there facts and circumstances which will mitigate and take from them? But remember, gentlemen, above all things,—1. You are to follow the rule of law I have given you; 2. You are to ascertain whether Mr. Leggett is responsible; 3. If he is responsible, you are to give the actual damages, no matter how small or how high; 4. You are to ascertain whether the circumstances are such as call for added, exemplary damages, and if so, what they should be,—whether they should be anything, whether they should be mitigated by reason of any provocation, or whether they should be rendered to their full extent.”

We think this charge is within the rule best supported by the authorities, and within the spirit of the decisions, so far as any have been made in this court, inasmuch as the arrest was clearly without authority: *Allor v. Wayne Co. Auditors*, 43 Mich. 76; 1 Russell on Crimes, 598, 600; *People v. Burt*, 51 Mich. 199; *People v. Haley*, 48 Id. 495; *Drennan v. People*, 10 Id. 169; *Quinn v. Heisel*, 40 Id. 576; *Way's Case*, 41 Id. 299; *Commonwealth v. Carey*, 12 Cush. 252. As to exemplary damages, see *Detroit Post and Tribune Co. v. McArthur*, 16 Mich. 447; *Brushaber v. Stegemann*, 22 Id. 266; *Fay v. Swan*, 44 Id. 544; *Elliott v. Van Buren*, 33 Id. 49; 20 Am. Rep. 668; *Batterson v. Chicago etc. R'y*, 49 Mich. 191; *Ganssly v. Perkins*, 30 Id. 493; *Scripps v. Reilly*, 38 Id. 10; *Welch v. Ware*, 32 Id. 77; *Johnston v. Disbrow*, 47 Id. 59; *Druse v. Wheeler*, 22 Id. 439; *Friend v. Dunks*, 37 Id. 25; *Evening News Ass'n v. Tryon*, 42 Id. 549; 36 Am. Rep. 450; *Livingston v. Burroughs*, 33 Mich. 511; *Raynor v. Nims*, 37 Id. 34; 26 Am. Rep. 493; *Hamilton v. Smith*, 39 Mich. 222; *Tefft v. Windsor*, 17 Id. 486; *Vanderpool v. Richardson*, 52 Id. 336; *Van Deusen v. Newcomer*, 40 Id. 90; *Hill v. Taylor*, 50 Id. 549.

All that was proper to be given in the defendant's request to charge was included in the foregoing instructions.

It is the complaint of the learned counsel for the defendant that the court directed the attention of the jury to damages arising from injury to the feelings, when discussing exemplary damages, as well as when charging them what constituted actual damages. We have in the above quotation from the charge all that he said upon the subject excepted to by defendant's counsel, and we do not think the exception well taken.

It is of little consequence by what name the damages given are called, provided the case is one involving that class of injuries for which the plaintiff is entitled to recover. They may be called "exemplary," "punitive," "vindictive," "compensatory," or "added" damages. The important question always is, in every case, Was the character of the wrong suffered, or injury sustained, such as may be lawfully atoned for or compensated in money?

Actual damages are those which the injured party is entitled to recover for wrongs received and injuries done when none were intended. Damages beyond these, where the injuries and sufferings were intended, or occur through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse, are frequently and properly given, and have been variously designated by the terms above mentioned. The first are measured by known and well-defined rules. No rule can be laid down, properly measuring or limiting the damages allowable in the other class of cases, except they must not be oppressive, or such as to shock the common sense of fair-minded men; and they are therefore left to the reasonable discretion of the jury. A more definite rule cannot well be given as to these, as what would be right and just must depend entirely upon the circumstances of each particular case.

The jury by their verdict found the defendant guilty of the unlawful acts and trespasses to the person and feelings of the plaintiff complained of in his declaration, and if the wrongs inflicted by such unlawful acts were not intended, the lack of such intention could not prevent the pain and suffering experienced by the plaintiff by his false imprisonment, or prevent the physical discomfort—the sense of shame, mortification, outrage, and disgrace—inflicted upon and endured by the plaintiff; and if so, they were but the natural consequences of the injury the plaintiff received by the treatment of the defendant, and they were all elements to be taken in

consideration by the jury in determining the actual damages, and no error was committed by the court in so charging the jury. It is no objection to this view that the same elements, or some of them, must be considered in fixing the amount of exemplary damages, when such are given.

Nowhere in the record or briefs of counsel do we find the damages awarded in the case claimed to be excessive, provided the plaintiff's declaration should be found sustained, and that question is settled by the verdict of the jury.

The case as presented by the record is not one calling for any very great amount of refining upon this subject, and we do not feel called upon, under the facts appearing in this case, to apply any technical rules, if such exist.

The record, we think, shows a fair trial, and no error is committed requiring a reversal, and the judgment must therefore be affirmed.

ARREST WITHOUT WARRANT, WHEN IT MAY BE JUSTIFIED: *Brockway v. Crawford*, 67 Am. Dec. 250, and note 253; *Wade v. Chaffee*, 5 Am. Rep. 572; *Kennedy v. State*, 57 Id. 99; *Doering v. State*, 19 Id. 669, and note 672; when warrant must be shown: *Hawkins v. Commonwealth*, 61 Am. Dec. 159, note; *State v. Garrett*, 84 Id. 359; *Bright v. Patton*, 60 Am. Rep. 396.

PROPER REMEDY FOR CAUSING ARREST ON WARRANT, CHARGING ACT NOT CRIME, but a trespass only: See *Kramer v. Lott*, 88 Am. Dec. 556, and note 559.

OFFICER OR OTHER PERSON SEEKING TO SERVE VOID WARRANT BECOMES TRESPASSER: *Commonwealth v. Crotty*, 87 Am. Dec. 669.

COMPENSATORY DAMAGES, WHAT THEY SHOULD INCLUDE: *Pennsylvania R. R. Co. v. Books*, 98 Am. Dec. 229, and cases collected in note 234; *Matthews v. Warner*, 26 Am. Rep. 396; *Borland v. Barrett*, 44 Id. 152; *Smith v. Bagwell*, 45 Id. 12.

POLICE OFFICER, ACTING IN GOOD FAITH AND WITH REASONABLE CAUSE, IS NOT CRIMINALLY LIABLE for arresting without a warrant a sober man for being publicly intoxicated: *Commonwealth v. Cheney*, 55 Am. Rep. 448.

PLEA JUSTIFYING ARREST WITHOUT WARRANT, ON SUSPICION OF FELONY, SHOULD SET FORTH the grounds of the suspicion: *Wade v. Chaffee*, 5 Am. Rep. 572.

FREEHLING v. BRESNAHAN.

[61 MICHIGAN, 540.]

CREDITORS CANNOT RELY UPON ANY QUESTION OF FRAUD in dealing with exempt property.

UNDER EXEMPTION LAWS, HUSBAND MUST BE CONCLUSIVELY PRESUMED TO RESIDE WITH HIS FAMILY, where they occupy the old home with his consent, and there has been no separation between the husband and wife; and he cannot, by his voluntary absence, deprive his family of their rights in the enjoyment of the household property, nor will it cease to be exempt while so held.

REPLEVIN. The opinion states the case.

G. A. Wolf and H. J. Hoyt, for the plaintiff and appellant.

Edward J. Smith and Nelson De Long, for the defendant.

By Court, CAMPBELL, C. J. Defendant, sheriff of Muskegon County, levied an attachment in favor of George E. Dowling and others against one James M. Webster, who had previously lived in Montague, in that county, and whose family still lived there, upon a considerable amount of property, all or most of which would be exempt in favor of a resident householder. Freehling replevied it, under a transfer from Webster's wife and daughter, who themselves claimed under a bill of sale made by Webster to them in 1883, more than two years before the levy. Upon the back of this paper was pasted a certificate of acknowledgment purporting to be signed by an Illinois justice, September 19, 1885, concerning which there was no proof. The execution by Webster was proved to have been in June, 1883, and this was not contradicted by any evidence.

Upon the trial, a principal controversy was concerning Webster's residence, and the exempt quality of the goods. There was also some stress laid before the jury upon Freehling's want of title. We can see nothing which justified the raising of any question before the jury concerning the date of Webster's transfer, whatever may have been its nature. The testimony introduced by defendant himself showed its execution in 1883. There was nothing to throw doubt upon this question. Even had it been shown that Webster acknowledged it in 1885, that would not of itself impugn it, as an acknowledgment of such a document is nugatory, so far as we have any information, under the laws of Illinois. The certificate does not prove itself, and the witnesses who proved the paper proved its earlier completion. It is not uncommon to

acknowledge an existing paper to save the necessity of other proof.

If this property was exempt, then the defendant could not rely on any question of fraud, because creditors cannot complain of any dealing with exempt property. Neither is it important whether the transfers were absolute or for security, because the transferees would be entitled to possession, and could transfer possession to their own grantees or mortgagees. The question comes back to the exemption, in case there was any right in Webster left.

There was no dispute but that he once resided in Montague, and that his family never ceased to reside there. He must, under the exemption laws, be conclusively presumed to reside where his family live with his consent, where there has been no separation between husband and wife, and where they occupy the old home. He could not, by his voluntary absence, deprive his family of their rights in the enjoyment of the household property, and it could not cease to be exempt while so held. The wife, as well as the husband, had recognized legal rights in it, and creditors cannot intermeddle with it.

This question of residence was not open to dispute on the evidence as it stood.

As the jury were allowed to treat as doubtful what we think was not so upon the undisputed facts, their verdict cannot be upheld.

The judgment must be reversed and a new trial granted.

SHERWOOD, J. I concur in the result.

HUSBAND LIVING AS BOARDER FOR SEVEN YEARS, SEPARATE FROM WIFE, AND NOT CONTRIBUTING TO HER SUPPORT, they having no children, is not the "head of a family," within the statute of exemption: *Linton v. Crosby*, 41 Am. Rep. 107.

WHERE HUSBAND ABSENDS, AND HIS WIFE CONTINUES TO CARRY ON HIS FARM, she becomes the head of the family, and may maintain his claim to property exempt from execution: *Frasier v. Syas*, 35 Am. Rep. 466.

WHO IS HEAD OF FAMILY, AND WHAT CONSTITUTES FAMILY within meaning of exemption laws: See *Seaton v. Marshall*, 99 Am. Dec. 683, and note 684; *Calhoun v. Williams*, 34 Am. Rep. 759.

RAUB v. SMITH.

[61 MICHIGAN, 543.]

CONTRACT VOID UNDER STATUTE OF FRAUDS CANNOT BE USED FOR ANY PURPOSE, and is regarded as a nullity.

NOT ONLY IS VERBAL CONTRACT FOR SALE OF LANDS VOID, but a verbal agreement by one to purchase an interest in lands for another is void.

VERBAL AGREEMENT TO FORM COPARTNERSHIP INVOLVING PURCHASE OF LANDS for the purposes of the copartnership business includes a contract for the sale of land, and is void under the statute of frauds.

ASSUMPSIT. The opinion states the case.

Charles A. Withey and Dallas Boudeman, for the defendants and appellants.

M. Brown and J. H. Palmer, for the plaintiff.

By Court, SHERWOOD, J. This is an action of *assumpsit* brought by the plaintiff against the defendants to recover damages for the non-performance of an alleged contract to enter into a copartnership with the plaintiff.

The facts, as the plaintiff states them in his declaration, are substantially as follows:—

On the ninth day of February, 1880, the plaintiff had looked over 280 acres of pine land, and ascertained that there was six million feet of pine timber thereon then growing, which was very valuable, and had the descriptions of the land, which was situated in the county of Lake; that said lands were owned by the Grand Rapids and Indiana Railroad Company, and were for sale at fifteen dollars per acre; that plaintiff then knew the location of the lands, and the defendants did not; that plaintiff had a steam saw-mill, which he used to cut timber for other people; that at the same time the defendants owned in the said county of Lake a quantity of pine timber, consisting of about one million two hundred thousand feet, which they wished to have manufactured into lumber; and that they desired to contract with plaintiff to manufacture their timber into lumber, and then and there entered into an agreement with the said plaintiff, in substance, as follows:—

The plaintiff to show the defendants the lands he had selected, containing the six million feet of pine timber, and manufacture for the defendants into lumber the one million two hundred thousand feet of pine timber they owned, at \$2.50 per thousand, as soon as he could reasonably do so; and if the lands containing the six million feet of pine timber were as valuable as the plaintiff had represented them to the defend-

ants, then it was agreed that the plaintiff and defendants should form a copartnership, and that the defendants should purchase the lands shown to them by the plaintiff of the Grand Rapids and Indiana Railroad Company, the owner thereof, and should advance the purchase price (fifteen dollars per acre), and have the same conveyed to the plaintiff and defendants, so that the plaintiff should own one third and the defendants two thirds thereof; said plaintiff to pay to defendants for his share by manufacturing the timber upon said lands to be purchased into lumber; the lumber to be sold, and the plaintiff to have one third of the profits, and the defendants have two thirds, and the losses, if any, were to be borne in the same proportion.

The declaration then avers that each of said parties verbally agreed to perform their several agreements so made with each other; that the plaintiff has always fulfilled his part of said contract, and has manufactured into lumber the pine timber standing on the defendant's land, for the said \$2.50 per thousand, as soon as he could reasonably do so after making the agreement; and showed the other lands to the defendants; and that they were as valuable as he represented them to be to the defendants; and has always been ready to do the sawing of the timber grown upon said lands as he had promised; but that the defendants refused to go into partnership with the plaintiff, or to purchase the lands upon which the six million feet of pine timber stood, and have the same conveyed to the plaintiff, so that he would have and own an undivided one third thereof; but purchased the lands, and took the title to themselves, and afterwards sold the same for eight thousand dollars, and refused to allow him to share in the profits thereof; that the profits which would have accrued from the manufacture and sale of the timber would have been over twenty thousand dollars under the agreement thus made.

The defendants' plea was the general issue, with notice of set-off.

The cause was tried in the Mecosta circuit before a jury, and the plaintiff was allowed to recover a judgment for the sum of five thousand dollars damages.

Defendants bring error.

The defendant's contest in this case is principally upon two points: they claim that the contract relied upon by the plaintiff, and for the breach of which he must recover, if at all, being a verbal one, is within the statute of frauds; that the

foundation of plaintiff's claim is for the sale of an interest in lands, and that the contract therefor, not being in writing, is void.

Their second point is, that the rule of damages laid down by the court is incorrect, and not applicable to the facts in the case. Of course, if either of these points is well taken, the judgment must be reversed.

The language of the statute relied upon (How. Stats., sec. 6181) is as follows: "Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing."

This statute has frequently been before this court for construction, and it has been held that a contract which is void under the statute of frauds cannot be used for any purpose: *Chamberlain v. Dow*, 10 Mich. 319; *Hall v. Soule*, 11 Id. 494; *Holland v. Hoyt*, 14 Id. 238; *Grimes v. Van Vechten*, 20 Id. 410; *Scott v. Bush*, 26 Id. 421; 12 Am. Rep. 311; *Detroit H. & I. R. R. Co. v. Forbes*, 30 Mich. 176; *Hillebrands v. Nibbelink*, 40 Id. 646; *Sutton v. Rowley*, 44 Id. 112. Such a contract is regarded as a nullity.

It has been also held that not only is a verbal contract for the sale of lands void, but that a verbal agreement by one to purchase an interest in lands for another is void: *Dwight v. Cutler*, 3 Mich. 573; 64 Am. Dec. 105; *Bomier v. Caldwell*, 8 Mich. 463; *Hogsett v. Ellis*, 17 Id. 364, 365; *Abell v. Munson*, 18 Id. 312; 100 Am. Dec. 165; *Scott v. Bush*, 26 Id. 418; 12 Am. Rep. 311; *De Moss v. Robinson*, 46 Mich. 62; 41 Am. Rep. 144; *Wetmore v. Neuberger*, 44 Mich. 362.

It now remains to consider how stands the case of the plaintiff under the statute and the foregoing decisions of the court.

The action is to recover damages for refusing to perform an agreement to form a copartnership involving the purchase of lands.

The contract of copartnership which is set up in the declaration, and which it is averred the defendants agreed to make, was for the purchase of land containing a large quantity of pine timber, from which the manufacture and sale of lumber was to be the business carried on. The land had not yet been

purchased when the agreement sued upon is alleged to have been made, nor had any contract yet been made for the purchase thereof from the owner. By the terms of the agreement the defendants were to negotiate for the purchase for the parties, take the title in their names, and pay the purchase-money therefor; the defendants to be the owners of two thirds and the plaintiff one third of the property, when thus purchased, and the plaintiff to reimburse the defendants for his one third of the purchase price in his sawing and converting the timber into lumber for sale. Clearly, we think the agreement sued upon included a contract for the sale of land which was not in writing, and void under the statute of frauds, above given.

The contract for the purchase of the land was included in the agreement to engage in the copartnership, and is made the basis thereof, and the failure of the defendants to perform their undertakings relating thereto, as stated in the agreement sued upon, constitutes the plaintiff's sole ground for the damages he claims to have sustained.

In the case of *Levy v. Brush*, 45 N. Y. 589, it was held, where a verbal agreement was entered into between the plaintiff and defendant, by which the latter agreed to purchase land, and pay therefor from his own funds the necessary amount for that purpose, for the joint benefit of both, the plaintiff to reimburse one half the money so paid, the deed to be taken in the names of both, the defendant having made the purchase and taken the contract in his own name, and refused to convey one half to the plaintiff, that no action would lie to compel the execution of the agreement; that the case was within the statute of frauds; and that the defendant had a perfect right, both at law and in equity, to refuse performance.

In *Rawdon v. Dodge*, 40 Mich. 698, the agreement was verbal that Dodge should cause to be conveyed to Rawdon an interest in land held by one Sayles; and Mr. Justice Graves, in delivering the opinion of the court, said: "It is not claimed that written evidence was not necessary to show the agreement for the transfer of the equity of redemption, or that there was any such evidence, and the record imports that no proper writing was ever made. The agreement was, that an interest held by Sayles in the land should be conveyed to Rawdon, and the transaction was within the words and policy of the statute: How. Stats., secs. 6179-6181. The fact that the interest to be transferred was not then in Dodge, but was vested in Sayles could make no difference. It was a contract for the

sale of an interest in land, and it is not important that the title then resided in a third person." See also *Wright v. De Groff*, 14 Mich. 164; *Scott v. Bush*, 29 Id. 523; *Erben v. Lorillard*, 19 N. Y. 299; *Purcell v. Miner, Coleman, etc.*, 4 Wall. 513.

Other authorities might be cited, but we think the above are conclusive upon the point, and show clearly that the agreement relied upon by the plaintiff is within the statute of frauds, and that the following instruction requested by the defendants' counsel should have been given to the jury, viz.: "The contract upon which this action is based, and which is set up in the plaintiff's declaration, is not alleged to be in writing, and therefore, being within the statute of frauds, is of no force to bind any one, and it is your duty to find for the defendants."

There is no occasion for considering the other questions raised in the case.

The judgment must be reversed and a new trial granted.

AGREEMENT TO DIVIDE PROFITS RESULTING FROM SALE OF ANOTHER'S FARM IS NOT WITHIN STATUTE OF FRAUDS: *Bruce v. Hastings*, 98 Am. Dec. 592; *Lesley v. Rosson*, 77 Id. 679; *Snyder v. Wolford*, 53 Am. Rep. 22; *Treat v. Hiles*, 60 Id. 858; *Kilbourn v. Latta*, 60 Id. 373; but compare Id. 379, note.

ACTION WILL NOT LIE TO RECOVER CONSIDERATION PAID UPON ORAL AGREEMENT for the purchase of lands, if the vendor is willing to fulfill: *Galway v. Shields*, 27 Am. Rep. 351; *Day v. Wilson*, 43 Id. 76.

PENNSYLVANIA STATUTE OF FRAUDS DOES NOT APPLY TO PAROL CONTRACTS for sale of lands in another state, and does not avoid such contracts, though made in Pennsylvania: *Stegel v. Robinson*, 93 Am. Dec. 775, and see note 776.

ORAL SALE OF STUMPAGE, VOID WITHIN STATUTE OF FRAUDS, MAY BE VALID as a license: *Spalding v. Archibald*, 50 Am. Rep. 253.

ORAL AGREEMENT TO LET PUBLIC HALL FOR FOUR SPECIFIED DAYS AT CERTAIN PRICE FOR EACH DAY IS NOT SALE OF INTEREST IN LAND, and is not within the statute of frauds: *Johnson v. Wilkinson*, 52 Am. Rep. 698. So of an oral agreement with a mortgagor of lands to purchase the mortgage, sell the mortgaged property, satisfy the mortgage, and pay him the balance: *McGinnis v. Cook*, 52 Id. 115.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

THOMAS v. JOSLIN.

[36 MINNESOTA, 1.]

JUDGMENT FOR DEFENDANT, ON MERITS, IN ACTION FOR SPECIFIC PERFORMANCE of a contract for the sale of real estate, is a bar to another action to reform the same contract, and to enforce it as reformed.

PARTY IS BOUND BY HIS ELECTION TO SUE ON WRITTEN CONTRACT as executed, where he proceeds to trial and judgment in such suit, and he cannot thereafter bring an action to reform the contract.

ACTION for reformation and specific performance of a contract. The facts appear from the opinion.

D. A. Secombe, for the appellant.

Wilson and Lawrence, for the respondent.

By Court, **VANDEBURGH, J.** In a former action between the same parties, brought to enforce the contract in controversy (30 Minn. 388), it was held by this court that the letters of defendant, introduced in evidence upon the trial, authorized the agent through whom the contract was made to sell the land in controversy, subject to a certain lease to one Miller, and that the written contract, though otherwise authorized, was not in that particular in pursuance of the authority conferred by the defendant. The plaintiff was consequently defeated in that action, and thereupon he commenced this action for a reformation and specific performance of the contract; and he is now met by the objection that he has already had his day in court as respects the subject of this litigation, and that the former judgment is a bar to this action. We

think the objection well founded, and that the plea of former adjudication was properly sustained.

It is manifest that the substance of the controversy was the agency of Whitney and the extent of his authority. This was disclosed by the evidence on the former trial, which was composed of the correspondence of the agent and the defendant. The plaintiff must have been fully advised of the nature of the contract authorized by defendant's letters when the former suit was brought; and it appears from the findings of fact in this case that "it was a part of the agreement between the agent and plaintiff, intended to be embodied in the written contract, that the sale of defendant's land to plaintiff should be subject to the Miller lease." But in the face of all these facts, plaintiff elected to bring his action upon the contract in its imperfect form, and proceeded to trial and judgment therein. There was, however, in fact, but one contract between the parties, and but one claim or right upon which to base a recovery, though it may not have been fully evidenced by the writing. This claim has been once litigated, and, as defendant contends, finally determined; and it is now sought to be renewed by plaintiff upon a reformation of the contract. We are unable to see, however, why the matter should not be held to be *res adjudicata*, and the plaintiff bound by his election. The new issue was merely incidental to the main cause of action: *Winchell v. Coney*, 27 Fed. Rep. 482. The written contract was imperfect, but the plaintiff chose to rest a suit upon it as it was, and the judgment in the case, until set aside, was mutually binding upon the parties to it, and final as respects the merits of plaintiff's claim, notwithstanding mistakes and omissions in the proceedings, or the failure on the part of either party to make a full presentation of his case by the proper allegations and proofs: *Thompson v. Myrick*, 24 Minn. 4, 11. It is manifest that the two actions could not proceed *pari passu* to trial and final judgment in the same court, and that the plaintiff in such case would be compelled to elect, and be bound by his election. Neither can they be so prosecuted successively: *Washburn v. Great Western Ins. Co.*, 114 Mass. 175; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498; 33 Am. Rep. 655; 12 Hun, 640. In such cases the plaintiff should take a dismissal in the nature of a nonsuit before final submission on the merits.

The former suit was dismissed, in this instance, by the court, after the plaintiff's case was submitted; but it is not material

that the judgment was in form one of dismissal if it was in fact determined on the merits: *Boom v. St. Paul Foundry Co.*, 38 Minn. 253. It is claimed by the defendant, and was so held by the trial court, that it was so determined as upon a final submission of the case; but as the question is not raised or argued by the appellant, we do not consider it here.

Judgment affirmed.

WHEN ELECTION TO PROSECUTE ONE REMEDY BARS RESORT TO ANOTHER. — A party having a right to choose either one of two inconsistent remedies, who, with full knowledge of all the facts in the case, makes deliberate choice of one mode of redress, is bound by his election, and cannot afterwards resort to the other: *Orme v. Broughton*, 10 Bing. 533; *Ward v. Day*, 4 Best & S. 337; *Smith v. Baker*, L. R. 8 C. P. 350; 5 Moak's Rep. 323; *Clough v. London etc. R'y Co.*, L. R. 7 Ex. 26; *Thompson v. Howard*, 31 Mich. 309; *Morris v. Rexford*, 18 N. Y. 552; *Bank of Beloit v. Beale*, 34 Id. 473; *Rodermund v. Clark*, 46 Id. 354; *Moller v. Tucka*, 87 Id. 166, affirming same case, 9 Daly, 201; *Strong v. Strong*, 102 N. Y. 69; *Wilnot v. Richardson*, 2 Keyes, 519; *Cheesman v. Sturges*, 9 Bosw. 246; *Wright v. Pierce*, 4 Hun, 351; *Goss v. Mather*, 2 Lans. 283. Said Graves, C. J., in delivering the opinion of the court in *Thompson v. Howard*, 31 Mich. 312: "A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." And in *Orme v. Broughton*, 10 Bing. 538, Tindal, C. J., said: "After bringing an action in which the grievance alleged is the loss sustained by breach of the contract, I think it would be impossible to bring a second action, or to resort to any other means to enforce the contract, inasmuch as the first action is to be deemed an election as to the remedy sought." This rule applies only where the remedies are inconsistent, as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property: *Connihan v. Thompson*, 111 Mass. 270. Where the remedies are consistent and concurrent, the party may prosecute as many remedies as he has: *Bowen v. Mandeville*, 95 N. Y. 237. In delivering the opinion of the court in *Connihan v. Thompson*, 111 Mass. 271, Wells, J., said: "It is contended that, by commencing an action at law in which the land in question was specially attached, the plaintiff waived his remedy in equity. But the remedy in equity, by compelling specific performance, and that at law in damages for the breach, are both in affirmance of the contract. They are alternative remedies, but not inconsistent; and remedy in both forms might be sought in one and the same action. If the plaintiff institute separate actions, he cannot carry both to judgment and satisfaction. He may be compelled, by order of the court, at any stage of the proceedings to elect which he will further prosecute. But the mere commencement or pendency of one will not bar the other or defeat the action." So the mere bringing of an action for the price of goods sold is not a binding election of remedies, or a waiver of a right to rescind the sale on the ground of fraud, unless the action was brought with knowledge of the fraud: *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25. And in *Hays v. Midas*, 104 Id. 602,

affirming 39 Hun, 460, where a vendor brought an action to recover the price of goods sold, and obtained an attachment therein on the ground that the defendant had removed and disposed of his property with intent to defraud his creditors, which was levied on property of the defendant, but nothing was obtained by plaintiff under the attachment, and said action was subsequently discontinued, by order of the court, on notice to the defendant, it was held that plaintiff was not precluded thereby from rescinding the sale on the ground that it was induced by fraud on the part of the vendee, and from bringing an action to recover the goods sold, in the absence of proof that the vendor brought the first action with knowledge of the fraud. But where the plaintiffs sued the defendant on a contract at law, and a few days before the trial discovered facts amounting to a fraudulent concealment by the defendant, but proceeded nevertheless to take a verdict for the amount claimed on which judgment was entered up, and they afterwards filed a bill in equity for relief against the contract on the ground of fraud, it was held that by going to trial and taking judgment the plaintiffs had made their election of their remedy at law, and the remedies at law and in equity being inconsistent, they were bound by that election: *Sanger v. Wood*, 3 Johns. Ch. 416.

WHERE PARTY HAVING RIGHT TO ELECT BETWEEN ACTION IN TORT OR IN CONTRACT waives the tort and sues upon the contract, he cannot afterward sue in tort, but is bound by his election, and confined to that mode of redress which he first chooses: *Smith v. Baker*, L. R. 8 C. P. 350; 5 Moak's Rep. 323; *Butler v. Hildreth*, 5 Met. 49; *Jewett v. Petit*, 4 Mich. 508; *Thompson v. Howard*, 31 Id. 309; *Nield v. Burton*, 49 Id. 53; *Rodermund v. Clark*, 46 N. Y. 356; *Acer v. Hotchkiss*, 97 Id. 395; *Benedict v. National Bank of the Commonwealth*, 4 Daly, 171; *Goss v. Mather*, 2 Lana. 283; *Kinney v. Kiernan*, 2 Id. 492. In *Smith v. Baker*, *supra*, the trustee of a bankrupt applied to the court of bankruptcy to declare a bill of sale, made by the bankrupt previously to the bankruptcy, fraudulent and void as against himself as trustee. The court made the order asked for, and the assignee paid over the proceeds of the sale. It was held that the trustee could not afterwards bring an action of trover against the assignee to recover the difference between the value of the goods and the amount realized from the sale. In *Butler v. Hildreth*, *supra*, it was decided that where an assignee, knowing all the facts of the case, brought an action against the vendee to whom the vendor had sold goods in fraud of his creditors, on a note given by such vendee, and secured the demand by an attachment on his property, he thereby so far affirmed the sale and waived his right to disaffirm it that he could not, by discontinuing that action and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them. In *Thompson v. Howard*, *supra*, the plaintiff brought an action in *assumpsit* to recover for wages of his minor son, proceeded to trial, and submitted his case to the jury, who disagreed. He then discontinued that action and brought another action for damages for enticing away and harboring said son; but the court held that he had made an election to sue in contract, and could not maintain an action in tort. In *Benedict v. National Bank of the Commonwealth*, *supra*, the plaintiff, having been induced to make a loan on the security of forged bonds, after discovering the fraud, sued on the contract and attached the money of the borrowers standing to their credit in bank; but, proceedings in bankruptcy having been taken against the defendants in that suit, he discontinued, and brought an action in tort against the bankrupt and his assignee in bankruptcy, claiming that the money in bank was the identical money obtained from him by fraud, and

that he was entitled to it as owner. It was, however, held that, by the proceedings in the first suit, the plaintiff had elected to affirm the contract, and was, therefore, barred from bringing a second suit founded in tort. So, on the other hand, where a plaintiff elects to disaffirm the contract and sue in tort, he cannot thereafter affirm the contract in part, and sue thereon: *Wile v. Brownstein*, 35 Hun, 68. But the vendor of goods, the sale and delivery of which have been induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion, nor is the effort a defense to an action to recover possession against one in whose hands a part is found: *Powers v. Benedict*, 88 N. Y. 605; *Hersey v. Benedict*, 15 Hun, 282. In *Moller v. Truska*, 87 N. Y. 166, affirming same case, 9 Daly, 207, the plaintiff sold goods to Valk Brothers, and the latter sold them to the defendant, Truska. Valk Brothers were at the time of the sale insolvent, and within a few days after went into bankruptcy. The plaintiffs brought an action to recover the goods on the ground that the sale was induced by fraud, in which the defendant participated. After the commencement of this action, the plaintiffs proved their debt in the bankruptcy proceedings, and received their dividend, but after doing so, they returned the dividend and had their claim canceled. The court held that they were not precluded by what they had done from maintaining their action.

WHAT IS EVIDENCE OF ELECTION. — Any decisive act of affirmance or disaffirmance of a voidable contract or sale, done with knowledge of the facts, is evidence of election. And the bringing of a suit is such a decisive act: *Kimball v. Cunningham*, 4 Mass. 502; *Connihan v. Thompson*, 111 Id. 270; *Sanger v. Wood*, 3 Johns. Ch. 416; *Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 Id. 356; *Moller v. Truska*, 87 Id. 166. Wells, J., in delivering the opinion of the court in *Connihan v. Thompson*, *supra*, said: "The defense of waiver by election arises when the remedies are inconsistent, as where one action is founded on an affirmance, and the other upon the disaffirmance of a voidable contract or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon." It is also held that charging a party in an execution at law, after a commission in bankruptcy has issued, is an election to take the remedy at law, and the party must abide by it, and cannot afterwards proceed under the commission: *Ex parte Warder*, 3 Brown Ch. 191; *Ex parte Cator*, 3 Id. 216.

PARTY CANNOT MAINTAIN BILL IN EQUITY TO REFORM CONTRACT after he has brought an action at law upon the contract as it is, and been defeated in that action. By bringing his action upon the contract he has elected to affirm it, and is bound by his election: *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Washburn v. Great Western Ins. Co.*, 114 Id. 175; 4 Ins. Law J. 112; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498; affirming same case, 12 Hun, 640; 33 Am. Rep. 655. In delivering the opinion of the court in *Washburn v. Great Western Ins. Co.*, *supra*, Gray, C. J., said: "We are of the opinion that the plaintiff, by bringing an action at law upon the policy in its original form, and prosecuting that action to trial, verdict, and judgment, upon the issue whether he had complied with the warranty contained therein, conclusively elected to consider it as expressing the true contract between

himself and the insurance company, and to abandon any attempt to have it reformed in equity. His bill does not assert an equitable right which, although it could not have been secured to him in the action at law, might co-exist with the right asserted by him in that action; but proceeds on grounds wholly inconsistent with those maintained by him in the action at law, and seeks to show that his contract with the defendants was essentially different from that which he alleged, and submitted to the final judgment of the court, in that action. If the actual contract was as alleged in the bill in equity, the issue tried at law was but a moot question, having no bearing upon the rights of the parties."

CLAPP v. MINNEAPOLIS AND ST. LOUIS RAILWAY Co.

[26 MINNESOTA, 6.]

IN ACTION FOR DEATH FROM ACCIDENT CAUSED BY BROKEN SWITCH-RAIL, EVIDENCE OF SIMILAR ACCIDENTS at the same switch while the rail was in substantially the same condition is admissible.

EMPLOYEE OF RAILROAD COMPANY DOES NOT ASSUME RISK OF INSUFFICIENCY OF SWITCH-RAIL to support the weight of rolling stock used on the road, where it does not appear that he knew of the defective condition of the switch, the liability of the rail to break, or the special danger from that cause likely to arise from running his engines over it.

REAL GROUND OF PARTY'S OBJECTION TO CHARGE TO JURY must be fairly disclosed to the court, at the time it is given; otherwise the objection will be disregarded.

COURT MAY INSTRUCT JURY TO CONSIDER AGE, HEALTH, CAPACITY TO EARN MONEY OF PERSON KILLED, and the injury to his business as disclosed by the evidence, in an action brought for the benefit of the widow and next of kin, to recover damages for injuries causing death.

ACTION brought by the plaintiff, as the administratrix of her deceased husband, to recover damages for the alleged negligence of the defendant, resulting in the death of her intestate, who was a locomotive-engineer in the defendant's employ. The plaintiff recovered a verdict for two thousand five hundred dollars. A new trial was refused, and the defendant appealed. Other facts appear from the opinion.

J. D. Springer, for the appellant.

W. E. Bramhall and J. H. Parker, for the respondent.

By Court, **VANDEBURGH, J.** The alleged cause of the accident which resulted in the death of plaintiff's intestate was a defective switch, and broken rail connected therewith. After the accident, the rail in question was found broken and displaced. The jury found specially, upon sufficient evidence, that the rail was cracked the day before the accident occurred, and the evidence in plaintiff's behalf tended to show that the

defendant had notice of its condition in time to have replaced it with a sound rail.

1. The court allowed the plaintiff to prove that engines had previously run off the track at the same place, both before and after the time in question. But the evidence also tended to show that, when such accidents occurred, the switch was in substantially the same condition as in this instance as respects the particular defects complained of, except that it appeared, by the evidence of one witness, that the engine (observed by him) ran off the track because the switch was misplaced, so that the admission of his evidence proved to be error without prejudice. The remaining evidence received upon the same point was properly admissible under the rule laid down upon the former appeal herein: *Sub nomine Morse v. Minneapolis and St. Louis Railway Co.*, 30 Minn. 465.

2. The question propounded to the witness Sargent, in reference to the character and safety of the switch in question, in the condition in which it was shown to be, was proper. He was shown to be an expert, and competent to express an opinion on the subject.

3. The witness Guerin, also an expert, was permitted, against defendant's objection, to testify that the iron rail in question was too weak to support the engines and rolling stock used on the road. This is assigned for error, on the ground that it was immaterial and irrelevant, and that the deceased must be presumed to have assumed the risk of the insufficiency of the rail. It does not appear, however, that he knew of the defective condition or operation of the switch, or the liability of the rail to break, or the special danger from such cause likely to arise from running two engines, coupled together, over it. It was the duty of the defendant to use reasonable diligence to furnish a safe road-bed and instrumentalities for its employees, and we cannot assume that operatives, who are not charged with any responsibilities in reference to the condition of the road-bed and switches, assume the risk of particular defects, unless it appears that they are advised of the facts and dangers. The evidence was relevant to the issues which embraced the sufficiency of the switch and rail in question.

4. As the court, in its charge, expressly confined the attention of the jury to the evidence tending to prove negligence on the part of the company in the particulars above referred to, it was not error to instruct them that, if they found from the

nce that the negligence of defendant caused the death of
 iff's intestate, they ought to find for the plaintiff. The
 ion of the court was particularly directed to the plain-
 charge of negligence, and no suggestion of contributory
 gence, if any there was, appears to have been made to
 ury by the defendant; so that, if this was intended to be
 al point of defendant's objection to the charge, it was not
 disclosed to the court.

The court also charged that, in determining the question
 mages, the jury might take into consideration the age
 nry L. Morse when killed, the injury to his business, his
 ility to earn money, his health, and general condition in
 s they should find from the evidence before them. The
 of defendant's objection to these instructions, as made
 the argument, is, that these were questions which might
 rly have been considered had Morse himself survived,
 rought an action for personal injuries which disabled
 but were improper for the jury to consider in this action.
 matters were, however, for the jury, in considering the
 able expectation of pecuniary benefit which she might
 ably have been expected to receive in case he had sur-
 , and her consequent loss and damage upon his decease.
 o not think the jury were, in fact, misled; but if the de-
 nt deemed additional instruction as to the correct rule of
 ges important, or that the court should have been more
 it in its charge, counsel should have directed the atten-
 of the court to the matter at the time.
 see no ground for a new trial, and the order denying it
 d be affirmed.

IN SERVANT ASSUMES RISK OF DEFECTS IN MACHINERY OR APPLI-
 See *Bureka Co. v. Bass*, 60 Am. Rep. 152; *Rice v. King Phillip Mills*,
 80; *Stroble v. Chicago etc. R'y Co.*, 59 Id. 456; *Texas etc. R'y Co. v.*
rd, 59 Id. 639; *Thorpe v. Missouri Pacific R'y Co.*, 58 Id. 120; *Schulz*
ago & N. W. R. R. Co., 58 Id. 881; *Jones v. Florence Mfg. Co.*, 57 Id.
rossman v. Lehigh V. R. R. Co., 57 Id. 479; *Bajus v. Syracuse etc. R. R.*
Id. 723; *Bryant v. Burlington etc. R'y Co.*, 55 Id. 275; *Sweeney v. Ber-*
l. Co., 54 Id. 722; *Kelly v. Abbott*, 53 Id. 292; *Hooper v. Columbia*
R. Co., 53 Id. 691; *Leary v. Boston & A. R. R.*, 52 Id. 733; *Manufac-*
Co. v. Morrissey, 48 Id. 669; *Missouri Furnace Co. v. Abend*, 47 Id. 425;
v. Minneapolis etc. R'y Co., 47 Id. 785; *Atlanta Cotton Factory Co. v.*
47 Id. 750; *Flynn v. Kansas City etc. R. R. Co.*, 47 Id. 99; *Hathaway*
igan O. R. R. Co., 47 Id. 569; *Cowles v. Richmond & D. R. R. Co.*, 37
Id.; *Kelley v. Silver Spring Co.*, 34 Id. 615; *Baltimore & O. R. R. Co. v.*
Id., 34 Id. 291; *Smith v. St. Louis etc. R'y Co.*, 33 Id. 484; *Lovejoy v.*
& L. R. R. Co., 28 Id. 206; *Mullan v. Philadelphia etc. Co.*, 21 Id. 21

Ladd v. New Bedford R. R. Co., 20 Id. 331; *Gibson v. Erie R'y Co.*, 20 Id. 552; *Chicago & N. W. R'y Co. v. Taylor*, 18 Id. 626; *Patterson v. Pittsburg & C. R. R. Co.*, 18 Id. 412; *Illinois C. R. R. Co. v. Welch*, 4 Id. 593; *Columbus etc. R'y Co. v. Arnold*, 99 Am. Dec. 615, note 626, where other cases in that series are collected.

OBJECTIONS TO CHARGE TO JURY, WHEN AND HOW TO BE TAKEN: See *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 114, note 132, where this subject is discussed, and other cases in that series are collected.

EVIDENCE OF FORMER ACCIDENTS, ADMISSIBILITY OF: See *Parter v. Portland Publishing Co.*, 31 Am. Rep. 262; *City of Chicago v. Powers*, 89 Am. Dec. 418, note 421, where other cases in that series are collected.

MEASURE OF DAMAGES FOR INJURY CAUSING DEATH: See *Mansfield Coal & C. Co. v. McNery*, 36 Am. Rep. 662; *Rockford etc. R. R. Co. v. Delaney*, 25 Id. 308; *Ill. v. Forty-second Street etc. R. R. Co.*, 7 Id. 450; *O'Mara v. Hudson River R. R. Co.*, 88 Am. Dec. 61, note 65.

COLMAN v. GOODNOW.

[36 MINNESOTA, 9.]

ONE WHO FURNISHES MATERIAL FOR BUILDING ERECTED ON VILLAGE LOT, under a contract with parties in possession of the lot, acquires a mechanic's lien on the building and lot, although the title to the lot was, at the date of the contract, in a third person, who conveyed the same, after a part of the material was furnished, to one of the parties to the contract, to whom the other party at the same time transferred his interest. The acquisition of the title united in the party acquiring it the ownership of the house and lot, and the lien rests upon his interest in both, and he is not permitted to defeat it by setting up title in a third person previous to that date.

CLAIM OF LIEN NOT ATTESTED BY SEAL OF OFFICER BEFORE WHOM IT WAS SWORN TO, within the statutory time, is insufficient to preserve the lien.

ACTION to enforce mechanic's lien. The opinion states the case.

Andrew C. Dunn, for the appellant.

Daniel Rohrer, for the respondents.

By Court, VANDERBURGH, J. The plaintiff furnished material for the erection of the building mentioned in the complaint, under the contract with the defendants as therein alleged. The last of the materials for and used in the erection of such building under the contract with defendants was furnished on or about December 16, 1880.

By the terms of the contract, the building was to be erected for the defendants on the village lot described in the com-

plaint, and it was accordingly so erected thereon by them. The building was commenced in October, 1880, and they were in the actual possession of the premises, and were jointly interested in the contract and building, until the twenty-third day of November following, when the defendant Craig sold and transferred his interest to the defendant Goodnow, who went on and completed the building. At the time the contract was made they had not acquired title to the land, but the same was owned by one Pease, who conveyed the same to the defendant Goodnow at the date last mentioned. Whether the defendants before this time were in possession of the premises under a contract with Pease is not found. It does not appear that they were trespassers, and it will be presumed, the contrary not appearing, that they were rightfully in possession, and had some right upon or interest in the land sufficient to uphold a lien upon the building: Phillips on Mechanics' Liens, sec. 187. The lien extends to the joint and several interests in the building and land of the persons who jointly ordered or contracted for the materials furnished for the building. It is immaterial, therefore, that Craig transferred his interest to Goodnow; and as the question of the validity of the title is not in issue, in the absence of any adverse claims, it is also immaterial that the defendant Goodnow acquired the legal title after the lumber had been partly furnished.

The acquisition of the legal title by Goodnow united in him the ownership of the house and lot, and the lien rests upon his interest in both, and he is not permitted to defeat it by setting up title in a third person previous to that date. The lien is continuing, and binds the whole estate or interest of the debtor in the building and lot on which it stands: Gen. Stats. 1878, c. 90, secs. 7, 10. The plaintiff is therefore entitled to judgment as prayed in his complaint, if his lien is otherwise valid.

2. The time for filing a lien upon the premises for the indebtedness referred to expired December 16, 1881. Defendants claim that the proof fails to show that a properly verified account and claim for a lien was filed within that time. A paper purporting to be such claim was filed in the office of the register of deeds on June 25, 1881. The writing also purported to be sworn to before the register, C. W. Fenlason, but the signature of the officer was not authenticated by his official seal. It was received in evidence by the trial court, which finds that at the time of the trial, October, 1882, "there

was an impression of the seal of the register of deeds immediately at the left of the name of C. W. Fenlason, signed to the jurat of the affidavit, but such impression was made and placed there subsequently to the fifth day of August, 1881, and before the trial, but by whom does not appear, but that when C. W. Fenlason signed the jurat he used no seal at all in the execution of it"; and it is not shown that the instrument was so authenticated by the seal within the time allowed by law.

The court below found the lien invalid, and we see no way of escape from arriving at the same conclusion. The statute requires the register to affix his seal to all documents requiring his official signature. A special exception is made in the case of certificates indorsed on recorded instruments: Gen. Stats. 1878, c. 8, secs. 186, 188. But certificates of acknowledgment, and affidavits taken and sworn to before him, must, it will be seen, be so authenticated. We cannot regard the statute as merely directory. Registers of deeds were empowered to administer oaths and take acknowledgments by the act of March 1, 1856, and by the same act were directed to provide seals with which to authenticate their official signatures. Whether this should be so required was for the legislature to determine, and the courts are obliged to give effect to the statutory provision: *De Graw v. King*, 28 Minn. 118. His authority to take acknowledgments and affidavits is purely statutory, and the directions of the statute must be followed. The affidavit was therefore incomplete, and not properly authenticated, when filed and recorded; and in order to preserve the lien, it was necessary that the account and claim should be properly verified and duly filed within the required period: *Knight v. Elliott*, 22 Minn. 551. The defect could not be supplied by proof. The paper as verified must be complete in itself, and appear on its face to be what it ought to be, to entitle it to be recorded, and to make it evidence: *Id.* 552.

The respondent is entitled to raise the objection to the insufficiency of this paper to warrant a judgment other than rendered, notwithstanding it was received in evidence against his objection. Had it been ruled out, plaintiff would have failed for that reason. As it was received and made part of the record and findings, the defendants may still insist upon its insufficiency to sustain plaintiff's claim for a lien, and that the conclusion of law and decision of the court refusing such lien are supported by the record.

We regret that the case must turn on this point, but we see no way of avoiding it.

Judgment affirmed.

MECHANICS' LIENS, ESTATES AND INTERESTS AFFECTED BY: See *Smith Bridge Co. v. Bowman*, 52 Am. Rep. 67; *Graham v. Mt. Sterling Coalroad Co.*, 29 Id. 412; *Tuttle v. Howe*, 100 Am. Dec. 205, note 211, where other cases in that series are collected; *Galbreath v. Davidson*, 99 Id. 233, note 236.

STRICT COMPLIANCE WITH PREREQUISITES REQUIRED BY STATUTE must be shown by a party claiming the benefit of the mechanic's lien law: *Farmers' Bank v. Winslow*, 74 Am. Dec. 740.

WILSON v. JAMISON.

[86 MINNESOTA, 59.]

IN SUIT TO FORECLOSE MORTGAGE, PARTIES MAY LITIGATE VALIDITY OF TAX TITLE asserted by the holder of a junior lien to give him an absolute title to the land, discharged from the lien of the mortgage, where the holder of such junior lien has been made a party defendant in the suit.

HOLDER OF JUDGMENT LIEN JUNIOR TO MORTGAGE CAN, BY PURCHASING AT TAX SALE, ACQUIRE, as against the mortgagee, a title divesting the lien of the mortgage. (By equally divided court.)

ACTION to foreclose mortgage. The opinion states the case.

W. E. Bramhall, for the appellants.

B. S. Lewis, for the respondent.

By Court, DICKINSON, J. This is an action to foreclose a mortgage given in 1875 by the defendant Gadiant, the owner of the land, to McCutchen, of whose estate the plaintiffs are executors. In 1880 the defendant Jamison recovered a judgment, which was docketed in the county in which the land in question is situated, against the mortgagor, Gadiant. From the findings of the court, it further appears that in August, 1881, under the law of 1881 relating to forfeited lands, judgment was rendered charging this land with taxes for the year 1875, and several subsequent years, and the land was sold under such tax judgment in September, 1881; this defendant, Jamison, being the purchaser, and receiving the proper certificate of sale. Tax judgments were also rendered against the land in 1882, 1883, and 1884, for the delinquent taxes of 1881, 1882, and 1883, respectively. Sales were made of the land under each of these judgments, to persons who purchased in behalf of Jamison, and who afterwards assigned to him the interest acquired by them by such purchases. During all this time

Jamison was the owner of the judgment, which was a lien upon a portion of the land, eighty acres of the tract being a homestead. At the time of the recovery of the judgment against Gadiant, and until after the commencement of this action, Gadiant resided upon the land.

The court determined that, by the tax sales in 1881 and 1882, no redemption having been made, Jamison acquired title in fee, and that he holds the same discharged of the mortgage, and that a foreclosure sale of the mortgaged premises should therefore not be decreed. Judgment was entered accordingly, in which title in fee was adjudged to be in Jamison, discharged from the lien of the mortgage. This appeal is from the judgment.

It is urged that in this action there could be no such adjudication in favor of Jamison, and *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398, is relied upon as supporting this position. It may be conceded that the complaint does not tender an issue as to the validity of the tax judgments or sales, but only whether the judgment creditor, as a purchaser at the tax sales (assuming the judgments and sales to have been valid), stood in any other position as to the mortgagee than one having a junior lien or estate, with a right to redeem from the mortgage. But, taking into consideration the answer and the reply, the issues joined were broad enough to enable the parties to litigate, and the court to adjudicate, as to the validity of Jamison's asserted title, if the parties could in such an action submit such an issue, and if the court could entertain it; and it is to be here presumed, in favor of the determination and judgment in review, nothing appearing from the record to forbid the presumption, that all matters adjudicated, at least all which might have been litigated under the pleadings, were submitted for determination.

The case is distinguishable from that of *Banning v. Bradford*, *supra*, by the fact that the adverse title which is the subject of this adjudication was acquired subsequent to the mortgage. The original validity of the mortgage was not brought in question, but the tax title, if valid, had the effect to relieve the land from the encumbrance of the mortgage, and to extinguish the right of the mortgagee to the remedy here sought,—that is, to have the land sold for the satisfaction of his debt. Whether the lien of the mortgage had been thus extinguished depended upon the validity of the tax title. In an action in which it is sought to enforce

the mortgage through a judgment for a sale of the premises, we recognize no impropriety in an adjudication as to the validity of the title asserted by the defendant, and which, if valid, has, in effect, superseded or extinguished the lien of the mortgage. Such a fact would be a sufficient reason why the mortgage should not be enforced by a decree for the sale of the premises. As to this point, the case is closely analogous to that of *Churchill v. Proctor*, 31 Minn. 129, where in such an action the right to contest for the purpose of avoiding an adverse estate, which, if valid, defeated the mortgage, was sustained; and see *Allison v. Armstrong*, 28 Id. 276, 41 Am. Rep. 281, where a judgment sustaining the asserted adverse title was reversed upon the ground of the invalidity of such title, without any suggestion being made that such an issue could not be tried in an action such as that was to foreclose a mortgage: See also *Middletown Savings Bank v. Bacharach*, 46 Conn. 513.

The further question is here presented, whether the judgment creditor of the mortgagor, having by his judgment a lien upon the property junior to the mortgage, could by purchasing at tax sale acquire, as against the mortgagee, a title divesting the lien of the mortgage; or whether such a purchase will be treated in equity in favor of the mortgagee as a payment of the tax, and the acquisition of an additional lien. One of the members of the court, Mr. Justice Berry, was disqualified by relation to one of the parties from sitting in the case. The remaining four members of the court stand equally divided upon this question. This necessarily results in an affirmance of the decision of the court below upon this point, and for the purpose of this case; but since under these circumstances there is no final decision by this court of the principle involved, we forbear from any discussion of the subject in this opinion.

Some points were first made by the appellant in a brief presented in reply to the respondent's brief, which, as was announced at the time of the argument, we do not consider.

Judgment affirmed.

PARTY ENTERING ON LAND AS MERE INTRUDER MAY ACQUIRE TITLE UNDER TAX DEED, adverse to the former owner or his grantee: *Link v. Doerfer*, 24 Am. Rep. 417.

MORTGAGOR CANNOT ACQUIRE VALID TAX TITLE TO PREMISES as against the mortgagee: *Allison v. Armstrong*, 41 Am. Rep. 281; nor can a mortgagee set up a tax title acquired by him, as against the mortgagor: *Mills v. Tukey*,

83 Am. Dec. 74; nor can a purchaser under proceedings to foreclose a senior mortgage, to which a junior mortgagee was not made a party, by purchasing the mortgaged premises for taxes, thereby acquire rights which will bar the junior mortgagee from redeeming upon the payment of the proper amount due: *Anson v. Anson*, 89 Id. 514.

HOLDER OF TAX TITLE, WHETHER PROPER DEFENDANT IN SUIT TO FORECLOSE MORTGAGE. — The principal case is apparently at variance with *Odell v. Wilson*, 63 Cal. 159. In that case, which was an action to foreclose a mortgage, one Kay was made a party defendant, under the allegation that he had or claimed some interest in the mortgaged premises, which was subsequent and subject to the lien of the mortgage. The court found the claim of Kay to be invalid. It was based on a tax sale; but whether such sale was made before or after the execution of the mortgage does not appear from the report of the case. The supreme court, without considering the validity of Kay's claim, reversed the judgment, upon the ground, apparently, that the claim of Kay was adverse to that of the mortgagor, and could not be litigated in that action. So far as the two cases conflict, we think preference must be conceded to the principal case. If subsequently to the execution of a mortgage the property is sold for taxes, the whole title, if the sale is valid, vests in the purchaser, and the right of the mortgagor to appropriate the property to the satisfaction of his debt no longer exists. Even if the sale be invalid, the existence of the tax title must furnish a substantial impediment to the enforcement of the mortgage by a foreclosure sale, as no third person would purchase the property at a fair price and assume the burden of a subsequent litigation with the holder of the tax title. Hence the mortgagor should be permitted to bring the claimant before the court in the suit to foreclose, for the purpose of determining whether the mortgagor's rights have or have not been divested by the tax sale. The rule upon this subject, as stated by Mr. Jones, is, that "one who claims under a tax title which became a lien after the mortgage is a proper party, as the claim is made for an interest in the equity of redemption; but one claiming under a tax deed as a paramount title is not a proper party": *Jones on Mortgages*, sec. 1440, citing *Horton v. Ingersoll*, 13 Mich. 409; *Roberts v. Wood*, 38 Wis. 60.

BUTLER v. CHAMBERS.

[36 MINNESOTA, 69.]

STATUTE INTENDED TO RESTRAIN OR SUPPRESS MANUFACTURE AND SALE OF OLEOMARGARINE, and like compounds resembling and intended as a substitute for butter, is valid, as a legitimate exercise of the police power of the state. Such legislation is justified upon the ground that the use of the inhibited compounds is injurious to the public health. **PROVISIONS OF SECTION 4 OF CHAPTER 149, LAWS OF 1885, ARE LEGITIMATELY CONNECTED WITH SUBJECT** of the act, and included therein, and therefore the act is not repugnant to article 4, section 27, of the constitution of Minnesota.

ACTION brought to recover the value of merchandise sold and delivered to the defendant. The answer set up as a defense that the merchandise was manufactured out of oleagi-

nous substances, and out of a compound other than that produced from unadulterated milk, and out of a compound other than that produced from cream from unadulterated milk; that it was, when sold, an article manufactured and designed to take the place of butter produced from unadulterated milk, and to take the place of butter produced from cream of unadulterated milk; that it was offered for sale, and sold to defendant, as an article of food; that it was not pure skim-milk cheese, made from pure skim-milk; and that it was offered for sale, and sold and delivered, contrary to the provisions of Laws of 1885, chapter 149. The court below sustained a demurrer to the answer, and the defendant appealed from the order. Other facts are stated in the opinion.

Rogers and Hadley, for the appellant.

Warner, Stevens, and Lawrence, for the respondent.

By Court VANDERBURGH, J. The demurrer to the answer brings up the constitutional validity of Laws of 1885, chapter 149, section 4. The act is entitled "An act to prohibit and prevent the sale or manufacture of unhealthy or adulterated dairy products." Section 1 provides a penalty for selling, or exposing for sale, "unclean, impure, unhealthy, adulterated, or unwholesome milk," or the product thereof. Section 2 provides that "no person shall keep cows for the production of milk for market, or for sale or exchange, or for manufacturing the same into articles of food, in a crowded or unhealthy condition, or feed the cows on food that is unhealthy, or that produces impure, unhealthy, diseased, or unwholesome milk"; and also prohibits the manufacture or sale of the products of such milk. Section 3 prohibits the sale or delivery to any butter or cheese manufactory of "any milk diluted with water, or unclean, impure, or adulterated milk." Section 5 provides a penalty for exposing for sale butter or cheese branded or labeled with a false brand. Section 6 regulates the sale of condensed milk; and other provisions relate to the appointment and duties of the dairy commissioner.

These provisions of the statute are all unquestionably within the legislative authority; but it is contended that section 4 is unconstitutional, especially on the ground that it is an infringement upon the rights, privileges, and liberty of the citizens, without due process of law. The section in question reads as follows: "No person shall manufacture, out of any

oleaginous substance or substances, or any compound of the same, or any compound other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream from the same, or shall sell, or offer for sale, the same as an article of food. This shall not apply to pure skim-milk cheese, made from pure skim-milk."

The defendant contends that these provisions fall within the general police powers of the state, and are therefore valid.

In 1881 the legislature passed an act entitled "An act to regulate the traffic in oleomargarine": Laws 1881, c. 133. This act provides that "any person who shall knowingly sell, or offer for sale, any article or substance in semblance of butter, not the legitimate product of the dairy, made exclusively of milk and cream, but into the composition of which the oil or fat of animals, or melted butter, or any oil thereof, enters as a substitute for cream, in tubs, firkins, or other original packages, not distinctly, legibly, and durably branded, . . . shall be guilty of a misdemeanor," etc. It cannot be doubted that the act of 1881 was a legitimate exercise of police power. The public may be protected by appropriate legislation against imposition in the purchase of articles for consumption; and if, as we may assume, the prevalent compounds resembling butter in appearance and flavor, and put on the market as a substitute for it, and generally known as "oleomargarine," "butterine," etc., are liable to deceive and mislead purchasers and consumers as to the real nature of the product, and especially if such preparations are made of unwholesome ingredients, then we think there may be sufficient reasons why the legislature may, in its discretion, meet the evil sought to be remedied by provisions for the suppression of the manufacture and sale of such artificial compounds altogether: *State v. Addington*, 12 Mo. App. 214; 77 Mo. 110; *People v. McGann*, 34 Hun, 358.

It cannot be necessary, at this day, in view of the numerous decisions of the state and federal courts, to enter into any elaborate discussion to show that the legislature may exercise such powers in behalf of the state. As respects the right or liberty of the citizen to engage in business, and conduct industrial pursuits, these privileges are to be enjoyed in subordination to the general public welfare, and all reasonable regulations for the preservation and promotion thereof. "All property," says

the court in *Commonwealth v. Alger*, 7 Cush. 53, 85, "is held subject to the general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient": *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625.

The reasonable limits of the exercise of such power it is not easy to define. It is not a matter of caprice or unlimited discretion on the part of the legislature; but these questions can usually be best determined as cases arise, and within proper limits, it is for the legislature to judge as to the extent and character of restrictive measures which may be found necessary in any particular class of cases. In *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, 666, the court say: "A state is not sovereign, without the power to regulate all its internal commerce as well as police. . . . It is a bold assertion at this day that there is anything in the state or United States constitutions conflicting with or setting bounds upon the legislative discretion or action in directing how, when, and where a trade shall be conducted in articles intimately connected with the public morals, public safety, or public prosperity; or indeed, to prohibit and suppress such traffic altogether, if deemed essential to effect those great ends of good government."

It is also well settled that such laws are not invalid because in conflict with the power of Congress over commerce. In the *License Cases*, 5 How. 504, 577, it is said: "A state is not bound to furnish a market for imported goods, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens." And so in *Bartemeyer v. Iowa*, 18 Wall. 129, it was held that such legislation was not in conflict with the fourteenth amendment of the federal constitution: *Commonwealth v. Kimball*, 24 Pick. 359; 35 Am. Dec. 326, 332.

The amended New York law on the subject under consideration (Sess. Laws N. Y. 1885, c. 458, sec. 2) prohibits, among other things, the manufacture, except from unadulterated milk and cream, of any product "in imitation or semblance of" natural butter made from cream, and also prohibits the

sale of any article produced in violation of such act. In *People v. Arensberg*, 40 Hun, 358, 103 N. Y. 388, 57 Am. Rep. 741, 105 N. Y. 123, 59 Am. Rep. 483, a conviction for the violation of that act was sustained, on the ground that the legislature might not only interpose to protect the public health, but to prevent fraud and imposition in the simulation of a healthy article of food universally consumed by the people; and upon this proposition we are disposed to rest our decision in this case. The case just cited arose subsequent to that of *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, but was distinguished from it on the ground of the difference in the wording of the statutes under which the convictions were had. In the latter case, the prosecution was under a section like that of our own statute now under consideration, and the statute was held void chiefly because it was construed to be an attempt on the part of the legislature to drive the manufactured article from the market for the benefit of another industry, and to protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses,—in other words, that the object of the statute was to prohibit one industry in order to foster another. This assumes that the object of the legislature was for the benefit of a class, and that there were no reasonable grounds for the exercise of the police power; because, if there were such grounds, it is no objection that a legitimate industry is incidentally benefited as the practical result of the operation of the statute. We do not think the court would be warranted in setting aside this legislation on such grounds. As said by the court in *People v. Albertson*, 55 N. Y. 50: "Courts do not sit in review of the discretion of the legislature, or determine upon the expediency, wisdom, or propriety of legislative action in matters within the power of the legislature. Every intendment is in favor of the validity of statutes, and no motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the face, and to be gathered from the terms of the law itself."

Oleomargarine and kindred products have been manufactured and disposed of to a greater or less extent for years, and there has been sufficient opportunity to test, by observation and experience, their general character, and the methods adopted in conducting the business of the manufacture and sale of such substitutes for butter, so as to enable the legislature to determine as to the necessity or propriety of police regulation or

restriction. It is doubtless easy to introduce cheap and unwholesome ingredients into their manufacture, and the product is easily passed off upon the consumer, under the semblance of butter, without detection of the fraud.

As respects similar legislation restricting the sale of milk mixed with water, the court in *Commonwealth v. Waite*, 11 Allen, 264, 87 Am. Dec. 711, use this language: "It is notorious that the sale of milk adulterated with water is extensively practiced with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case." Similar statutes, prohibiting the sale of milk reduced below a certain standard on account of the presence of water, were held constitutional in *Commonwealth v. Evans*, 132 Mass. 11, and in *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344. We know of no good reason, therefore, why laws for the suppression, as well as regulation, of the manufacture and sale of the compounds against which the statute in question appears to be leveled may not be sustained.

The language of the section in controversy is the same as that in similar statutes of several of the states. In some instances the objection has been raised that its terms are too broad, and may be intended to include, not merely the compounds referred to, but other harmless preparations which consumers might choose to use in the place of butter. This point is not, however, raised by counsel in this case. It was assumed upon the argument that the statute in question was intended to restrain or suppress the manufacture and sale of oleomargarine and like compounds resembling and intended as a substitute for butter.

From the title of the act, and the general tenor and manifest object of its provisions, it may be fairly construed, we think, to have been directed against the manufactured substitutes for butter above designated; and the statute will hardly be construed to apply to articles bearing so little resemblance to butter that they could not be substituted for it as an article of commerce. For example, olive-oil is sold for table use, yet we think it could not reasonably be held to be a substitute for butter, within the meaning of the section in question; and that prosecution for the sale of such articles under this act could not be sustained under the strict rule of construction applicable to criminal prosecutions.

It is claimed that the act is repugnant to article 4, section

27, of the constitution, on the ground that the subject-matter of section 4 is not embraced in the title. But the provisions of that section are, we think, legitimately connected with the subject of the act and included therein. An article manufactured and sold as butter, which is not a genuine dairy product, would fairly come within the spirit and object of the act, as entitled, without reference to the extent of adulteration, or the peculiar process of manufacture, and though the product be wholly simulated.

This legislation sufficiently conforms to the title, and, as before observed, is justified upon the ground that the use of the inhibited compounds, in its tendency and results, is injurious to the public health; and especially because the adulterated article is not readily distinguished from the genuine, and is easily substituted for it, so as to work a fraud upon those who actually use and consume it, as well as upon purchasers; and for these reason it was considered by the legislature that the mischief could only be effectually suppressed or remedied by the imposition of severe penalties.

What the nature of the remedy should be, within the proper limits of the police power, was for the legislature to determine, and with the wisdom or policy of such legislation the courts have nothing to do.

Order reversed.

POWER OF STATE TO REGULATE OR PROHIBIT SALE OR MANUFACTURE OF ARTICLES. — It is undoubtedly the right of an American citizen to engage in any lawful calling that he chooses, and to dispose of his property as he sees fit, so long as by so doing he inflicts no injury upon others. But it is no less true that the legislature of a state may, in the exercise of its police power, pass laws for the regulation or prohibition of any trade or business that may be injurious to the safety or well-being of society. The police power of the state extends to all regulations affecting the health, good order, morals, peace, and safety of society. And when such regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted: *Slaughter-house Cases*, 16 Wall. 36; *Bartemeyer v. Iowa*, 18 Id. 129; *Beer Company v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, 97 Id. 501; *Stone v. Mississippi*, 101 Id. 814; *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 111 Id. 746; *Barbier v. Connolly*, 113 Id. 27; *Soon Hing v. Crowley*, 113 Id. 703; *Davis v. State*, 68 Ala. 58; 44 Am. Rep. 128; *Woods v. State*, 36 Ark. 36; 38 Am. Rep. 22; *Toledo etc. R'y Co. v. City of Jacksonville*, 67 Ill. 37; 16 Am. Rep. 611; *State v. Mugler*, 29 Kan. 252; 44 Am. Rep. 634; *Commonwealth v. Alger*, 7 Cush. 53; *Blair v. Forehand*, 100 Mass. 136; 1 Am. Rep. 94; *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153; *Commonwealth v. Evans*, 132 Id. 11; *Moore v. State*, 48 Miss. 147; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Bertholf v. O'Reilly*, 74 Id. 509; 30 Am. Rep. 323; *State v. Ah Chew*, 16 Nev. 50; 40 Am. Rep. 488; *State v.*

Burgoyne, 7 Lea, 173; 40 Am. Rep. 60; *Donnelly v. Decker*, 58 Wis. 461; 46 Am. Rep. 637; *Preston v. Drew*, 54 Am. Dec. 639; *State v. Gurney*, 58 Id. 782. Mr. Justice Bradley, in delivering the opinion of the court in *Beer Co. v. Massachusetts*, 97 U. S. 25, discussing this question, said: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. . . . Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects." And Endicott, J., delivering the opinion of the court in *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153, 155, said: "Every such law limits, restrains, impairs, and in some cases destroys the uses which were previously enjoyed of the property so made the subject of legislation, but the extent to which it may do so does not affect the validity of such laws, or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper legal sense of these terms."

A state cannot, however, under the disguise of the exercise of the police power, overthrow or impair the constitutional rights guaranteed to its citizens. It is not within the power of the legislature, under the pretense of exercising the police power of the state, to enact laws not necessary to the preservation of the health and safety of the community, but that will be oppressive and burdensome on the citizens: *Slaughter-house Cases*, 16 Wall. 36; *Toledo etc. R'y Co. v. City of Jacksonville*, 67 Ill. 37; 16 Am. Rep. 611; *Intoxicating Liquor Cases*, 25 Kan. 751; 37 Am. Rep. 284; *State v. Fisher*, 52 Mo. 174; *State v. Addington*, 77 Id. 116; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marz*, 99 N. Y. 377; 52 Am. Rep. 34. In the case last cited, Rapallo, J., delivering the opinion of the court, said: "No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." In *Intoxicating Liquor Cases*, *supra*, Brewer, J., said: "I do not think the legislature can prohibit the sale or use of any article whose sale or use involves no danger to the general public." And Wagner, J., in delivering the opinion of the court in *State v. Fisher*, 52 Mo. 174, 177, said: "A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservative of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land."

POWER OF STATE TO REGULATE OR PROHIBIT SALE OR MANUFACTURE OF INTOXICATING LIQUORS. — This subject is discussed at length in the note to *Commonwealth v. Kimball*, 35 Am. Dec. 331-339; and see *State v. Mugler*, 29 Kan. 252; 44 Am. Rep. 634.

OLEOMARGARINE. — In New York it has been held that a statute which absolutely prohibits the manufacture or sale of any compound designed as a substitute for butter, however wholesome, valuable, and cheap it may be,

and however openly and fairly the character of the substance may be avowed and published, is unconstitutional, because the prohibition is not limited to unwholesome or simulated substitutes: *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *People v. Arensberg*, 103 N. Y. 388, 393; 57 Am. Rep. 741; 105 N. Y. 123, 128; 59 Am. Rep. 483; see also *Northwestern Mfg. Co. v. Wayne Circuit Judge*, 58 Mich. 381; 55 Am. Rep. 693. Rapallo, J., who delivered the opinion of the court in *People v. Marx*, *supra*, said: "It appears to us quite clear that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of food." And after considering the limitations upon the legislative power of the state imposed by the state constitution and the constitution of the United States, and discussing the principles established by the state and national courts on this subject, he added: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race."

In Missouri a statute substantially identical with that of New York passed upon in *People v. Marx*, *supra*, was held to be constitutional and valid: *State v. Addington*, 77 Mo. 110; 12 Mo. App. 217. The defendant in that case sold oleomargarine which was stamped as such, and did not pretend that the article was butter. At the trial he offered to prove that the oleomargarine sold was healthful and nutritious, and in all respects as harmless and desirable a commodity as pure butter. The supreme court held that this testimony was properly rejected; that the constitutionality of the statute could not be tested in that manner. This same statute was held not to be violative of the constitution of the United States in *In re Brosnahan*, 18 Fed. Rep. 62. In a late case in Pennsylvania a similar statute was held to be constitutional, Gordon, J., dissenting: *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350. The following are the points decided in that case: The test of the reasonableness of a police regulation prohibiting the making and vending of a particular article of food is not alone whether it is in part unwholesome and injurious. If an article of food is of such a character that few persons will eat it knowing its real character; if at the same time it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and if in addition to this there is probable ground for believing that the only way to prevent the public from being defrauded into purchasing the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former, — then such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might not be found prejudicial to the public, if in buying it they could distinguish it from the production of which it is the imitation. The fact that scientific experts may pronounce a manufactured article intended for human food to be wholesome and not injurious, and that in a pure state it may be thus good for food, does not render it incompetent for the legislature to prohibit the manufacture and sale of the article, if in its judgment it be necessary to the protection of the

lives, health, and property of the citizens, and to the preservation of good order and the public morals.

The statute under which this case arose was held to fall within the police power of the state, which was described as the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and the people of the same.

Gordon, J., delivered a dissenting opinion, in which he maintained that the act in question was not only improvident and unreasonable, but also unconstitutional, and evidently passed for the welfare of dairymen, without regard to the welfare of the balance of the people. He considered that the act could not properly be regarded as a police regulation, because it was not alleged that the prohibited article was in the slightest degree injurious to the welfare or happiness of the people of the commonwealth. In the case of *State v. Addington*, 77 Mo. 110, Sherwood, J., delivering the opinion of the court, referring to the Missouri statute, said: "The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tend to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the legislature, when passing the act, exceeded the power confided to that department of the government; and unless we can say this, we cannot hold the act as being anything less than valid."

In *People v. Arensberg*, 103 N. Y. 388, 57 Am. Rep. 741, 105 N. Y. 123, 59 Am. Rep. 483, the prosecution was had under section 7 of chapter 183, New York Laws of 1885, which provided as follows: "No person, by himself, or his agents, or servants, shall render or manufacture out of any animal fat, or animal or vegetable oils not produced from unadulterated milk or cream from the same, any article or product in imitation or semblance of, or designed to take the place of, natural butter or cheese produced from pure, unadulterated milk or cream of the same, nor shall he or they mix, compound with, or add to milk, cream, or butter, any acids, or other deleterious substance, or any animal fats, or animal or vegetable oils not produced from milk or cream, with design or intent to render, make, or produce any article or substance, or any human food, in imitation or semblance of natural butter or cheese; nor shall he sell, keep for sale, or offer for sale, any article, substance, or compound made, manufactured, or produced in violation of the provisions of this section, whether such article, substance, or compound shall be made or produced in this state, or in any other state or country." The judgment on the first trial was reversed for error of the trial judge in submitting to the jury the bare question whether the defendant had manufactured or sold oleomargarine not made from milk or cream, and in omitting the essential question whether it was manufactured in imitation or semblance of butter. On the second appeal, the court sustained the constitutionality of the section quoted above, Rapallo, J., in delivering the opinion of the court, saying: "We are of opinion that such artificial coloring of oleomargarine for the mere purpose of making it resemble dairy butter comes within the statutory prohibition against imitation, and that such prohibition is within the power of the legis-

lature, and rests upon the same principle which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing its market price by making it resemble summer dairy butter, should the legislature deem such a prohibition necessary or expedient."

In that case it was contended on behalf of the defendant that oleomargarine must resemble butter, and if the manufacture of any article made in imitation or semblance of butter is prohibited, the manufacture of oleomargarine is made unlawful. But Rapallo, J., replying to this contention, said: "We do not think that this result follows. The statutory prohibition is aimed at a designed and intentional imitation of dairy butter in manufacturing the new product, and not at a semblance in qualities inherent in the articles themselves and common to both. If in their essential ingredients or elements the two articles were so identical that they must necessarily present the same appearance without resort to any artificial means to produce the resemblance, it is argued on the part of the prosecution that in that case it would be competent for the legislature to require that some means be resorted to by the manufacturers to distinguish the new article from the old; that the legislature has attempted to do this by requiring that the packages in which oleomargarine is sold be distinctly marked, and by other means; [but that if all these precautions fail to prevent deception of consumers, then it is lawful to require that in the manufacture of the substance itself some measure should be adopted to make it distinguishable in appearance from the ordinary dairy butter, such as by giving it a different color, or some other device. We do not deem it necessary now to pass upon this point, for in the evidence of this case there was sufficient to authorize the jury to find that the oleomargarine sold by the defendant, and that which he had in his store exposed for sale, had by artificial means, not essential or incident to the manufacture of the article, but resorted to for the mere purpose of imitation, been made to resemble dairy butter; that it was yellow in appearance, and looked like butter. It was known to the defendant to be oleomargarine, and was sold and offered for sale by him as such."

Replying to the argument that the substance sold was wholesome and innocuous, and that its manufacture and sale could not, therefore, be prohibited, the learned judge said: "Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious, and suitable for food as dairy butter, that it is composed of the same elements and is substantially the same article, except as regards its origin, and that it is cheaper, and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter made from animal fat or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as dairy butter, or that it is beyond the power of the legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects; but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in

cost or market value, if no other, would make it a fraud to pass off one article for the other." See also *People v. Waterbury*, 44 Hun, 493.

An act which prohibits the sale of oleomargarine without having it stamped is constitutional and valid: *Pierce v. State*, 63 Md. 592; *Palmer v. State*, 39 Ohio St. 236; 48 Am. Rep. 429; *State v. Dunbar*, 13 Or. 591. In the case last cited it was held that the charge of offering to sell was made out, if the defendant kept the article described in the indictment without any mark plainly distinguishing it from the true, genuine dairy products, in his common saleroom, with other produce that he was dealing in, and publicly exposed and exhibited the same with intent to offer it for sale. And an act making the possession of an article conclusive evidence of an intent to sell the same is not unconstitutional: *People v. Mahaney*, 41 Hun, 26; *People v. Hill*, 44 Id. 472.

MILK. — The power of the legislature to prohibit the sale of adulterated milk has been universally sustained. And the legislature may make it a criminal offense to sell pure milk mixed with pure water, although it could not prohibit the sale of either article when sold separately. The legislature may determine what reasonable laws ought to be enacted to protect the public against fraud and imposition, and may adapt the protection to the nature of the case. Such laws deprive no man of his property, or of any right to pursue an honest calling: *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Waite*, 11 Id. 264; *Commonwealth v. Evans*, 132 Mass. 11; *Commonwealth v. Bowers*, 140 Id. 483; *State v. Newton*, 45 N. J. L. 469; *Polinsky v. People*, 73 N. Y. 65; *People v. Cipperly*, 101 Id. 634; *People v. West*, 44 Hun, 162; *State v. Smith*, 10 R. I. 256; *State v. Smyth*, 14 Id. 100; 51 Am. Rep. 344; *State v. Groves*, Sup. Ct. R. I., Dec., 1885. And a municipal ordinance prohibiting the bringing of diluted milk into a city is within the scope of sanitary regulations, which the legislature may constitutionally confer on boards of health the power to enact: *Polinsky v. People*, *supra*.

OPIMUM. — The legislature of a state, in the exercise of the police power, may prohibit the selling or giving away of opium by any person except druggists and apothecaries, and may provide that druggists and apothecaries shall sell it only on the prescription of legally practicing physicians: *State v. Ah Chew*, 16 Nev. 50; 40 Am. Rep. 488; *Ex parte Yung Jon*, 28 Fed. Rep. 308. Hawley, J., delivering the opinion of the court in the former case, said: "It is not denied that the indiscriminate use of opium by smoking, or otherwise, tends, in a much greater degree, to demoralize the persons using it, to dull the moral senses, to foster vice, and produce crime, than the sale of intoxicating drinks. If such is its tendency, it should not have unrestrained license to produce such disastrous results. A law prohibiting the indiscriminate traffic in this poisonous drug, and placing the trade under such regulations as to prevent abuses in its sale, violates no constitutional restraints. Under the police power, recognized in theory, and asserted in the practice of every state in the Union in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the legislature has authority to place such restrictions upon the sale or disposal of opium as will mitigate, if not suppress, its evils to society."

COTTON IN THE SEED. — In *Mangan v. State*, 76 Ala. 60, it was held that a statute making it unlawful for any one to sell or offer for sale, within certain counties and boundaries specified, any cotton in the seed, or elsewhere to buy, sell, etc., any cotton in the seed raised within said counties, was a legitimate exercise of the police power, and not an unauthorized interference

with the rights of private property, and that it was not in violation of the fourteenth amendment to the constitution of the United States.

PROHIBITING SALE OF ARTICLES NEAR CAMP-MEETINGS. — Statutes prohibiting any person from carrying on any unusual business within a specified distance of any public assembly convened for religious worship, without the approval or consent of the managers of such assembly, are not unconstitutional: *Commonwealth v. Bearse*, 132 Mass. 450; 42 Am. Rep. 450; *State v. Cate*, 58 N. H. 240. But in *Commonwealth v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189, a statute forbidding any person to carry on the stabling business within a given distance of the grounds of a specified agricultural society during the continuance of its fairs, and imposing a penalty for any breach of the law, was held to be an unconstitutional interference with the right of enjoyment of private property.

SALE OF PATENTED ARTICLE. — The fact that an article is manufactured and sold under a patent issued by the United States does not deprive the legislature of a state, in the exercise of the police power, of the right to regulate or prohibit the manufacture or sale of such article within the state. The patent laws of the United States confer upon the patentee no authority to manufacture and sell the patented article in violation of the laws of a state: *Patterson v. Kentucky*, 97 U. S. 501; *Webber v. Virginia*, 103 Id. 344; *In re Brosnahan*, 18 Fed. Rep. 62; *State v. Telephone Co.*, 36 Ohio St. 227; 38 Am. Rep. 583; *Palmer v. State*, 39 Ohio St. 236; 48 Am. Rep. 429. Mr. Justice Harlan, in delivering the opinion of the court in *Patterson v. Kentucky*, 97 U. S. 505, said: "The Kentucky statute being then an ordinary police regulation for the government of those engaged in the internal commerce of that state, the only remaining question is, whether, under the operation of the federal constitution and the laws of Congress, it is without effect in cases where the oil, although condemned by the state as unsafe for illuminating purposes, has been made and prepared for sale in accordance with a discovery for which letters patent had been granted. We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the state established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale within a state of tangible personal property which that state declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits." And Upson, J., in delivering the opinion to the court in *Palmer v. State*, *supra*, said: "The patent laws of the United States give to inventors the exclusive right to their inventions, but do not give to them the right to disregard laws enacted to promote the welfare of the whole people. The state cannot discriminate against patented articles by imposing upon their sale conditions and restrictions not placed upon the sale of other similar articles; but the sale of all articles like those now under consideration, whether patented or not, may be restricted, regulated, or forbidden whenever the public good requires such restriction, regulation, or prohibition."

ACT PROHIBITING MANUFACTURE OF CIGARS IN TENEMENT HOUSES, in the cities of New York and Brooklyn, was held to be unconstitutional in *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

STEWART v. SMITH.

[86 MINNESOTA, 82.]

PURCHASE-MONEY MORTGAGE, EXECUTED CONTEMPORANEOUSLY WITH DEED OF PURCHASE, whether to the vendor or to a third person who advanced the purchase-money paid to the vendor, takes precedence over the lien of a prior judgment against the mortgagor.

DEED AND MORTGAGE NEED NOT BE EXECUTED AT SAME MOMENT, nor even on the same day, to make them contemporaneous, provided they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties.

ACTION to determine adverse claims to land. There was judgment for the plaintiff, and the defendants appealed from an order denying a new trial.

J. M. Gilman, for the appellants.

Shaw and Cray, for the respondent.

By Court, MITCHELL, J. Both parties claim title through Hiram Burlingham,—defendants under an execution sale on a judgment against Burlingham, rendered and docketed in October, 1859; plaintiff under a foreclosure sale on a mortgage from Burlingham to one Sidle, executed and recorded September 16, 1861. The facts regarding the execution of this mortgage, as found by the court upon undisputed evidence, are, in substance, that Burlingham, being desirous of entering this land by pre-emption, applied to Sidle for money with which to make the entry; that it was agreed between them that Sidle should lend Burlingham the money or land-warrant with which to make the entry; and that, as security therefor, Burlingham should give Sidle a purchase-money mortgage on the land when entered; that pursuant to the agreement Sidle loaned Burlingham the funds with which to enter the land; that thereupon Burlingham immediately went from his home (both parties resided in Minneapolis, eighty or ninety miles distant from the land-office) to Forest City, where the land-office at which the entry was to be made was situated, and upon his arrival, on Friday, September 13th, entered the land, paying therefor with the funds loaned him by Sidle, and immediately started back for his home, where he arrived on Sunday, September 15th; that on Monday, September 16th, pursuant to the agreement above referred to, he and his wife executed to Sidle the mortgage in question as security for the money so loaned, and interest, according to the previous agreement of the parties.

Upon this state of facts, it is quite clear that the lien of Sidle's mortgage had precedence over the lien of defendant's judgment. This is so under the familiar doctrine, more than once approved by this court, that a purchase-money mortgage, executed at the same time with the deed of purchase, takes precedence of any other claim or lien arising through the mortgagor. It will take the precedence whether executed to the vendor or to a third person who advanced the purchase-money which was paid to the vendor: *Jones v. Taintor*, 15 Minn. 423 (512); *Jacoby v. Crowe*, 16 Id. 93; 4 Kent's Com. *39; Washburn on Real Property, *176; Jones on Mortgages, 416.

The case of *Jones v. Taintor*, *supra*, is decisive of the present case, the facts in both being almost identical. An attempt is made to distinguish the two cases, because in the former the claim was the right of dower of the widow of the mortgagor, while in the present case it is the lien of judgment against the mortgagor. There is no room for any such distinction. The doctrine which gives precedence in such cases to a purchase-money mortgage is one of equity, and not of statutory origin, and applies to any claim to or lien upon the property arising through the mortgagor.

The present case is also sought to be taken out of the operation of the rule because the purchase of the land and the execution of the mortgage were not simultaneous, Burlingham having entered the land and obtained his certificate of entry on Friday, September 13th, while the mortgage to Sidle was not executed until Monday, September 16th. The rule as generally stated in the books is, that to give a purchase-money mortgage this precedence it must have been executed simultaneously, or at the same time, with the deed of purchase. Some ground for a narrow and literal construction of this language is furnished by the fact that the reason usually assigned for the doctrine is the technical one of the mere transitory seisin of the mortgagor, rather than the superior equity which the mortgagee has to be paid the purchase-money of the land before it shall be subjected to other claims against the purchaser. But it is evident, both upon principle and authority, that what is meant by this statement of the rule is not that the two acts—the execution of the deed of purchase and the execution of the mortgage—should be literally simultaneous. This would be almost an impossibility. Some lapse of time must necessarily intervene between the two acts. An examination of the cases will show that the

real test is not whether the deed and mortgage were in fact executed at the same instant, or even on the same day, but whether they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties: 1 Washburn on Real Property, *178; *Wheatley v. Calhoun*, 12 Leigh, 264; 37 Am. Dec. 654; *Love v. Jones*, 4 Watts, 465; *Snyder's Appeal*, 91 Pa. St. 477. Hence it will be found that in some of the cases the fact that the mortgage was executed pursuant to an agreement made prior to the execution of the deed of purchase has been the controlling consideration upon which the mortgage has been given precedence, although not in fact executed until some time after the execution of the deed. The reason is, that such a state of facts would show that both acts were but parts of the same continuous transaction. As evidence of the fact, such previous agreement would have equal probative force, although it might not be enforceable, because not in writing, and within the statute of frauds. Even if such agreement while executory was not enforceable, yet when once executed by the execution of the mortgage, it becomes as effectual as if originally in writing, and in equity will be deemed (if the rights of no innocent purchaser have intervened) as taking effect by relation as of the date of the agreement.

The facts bring the case clearly within the rule. There was a previous agreement that Burlingham should, after entering the land, give Sidle a purchase-money mortgage upon it. The mortgage was subsequently executed in pursuance of that agreement, and as soon after the entry of the land as was reasonably practicable. Both acts were evidently intended by the parties as parts of a single continuous transaction.

There is no force to the suggestion that one "forty" of the land entered was not included in the mortgage. If Sidle, either by mistake or intentionally, took security for the purchase-money on only part of the land purchased, defendants certainly have no ground of complaint.

As these views are necessarily decisive of the case, it is unnecessary to consider any of the other points discussed by counsel.

Order affirmed.

PURCHASE-MONEY MORTGAGE, PRIORITY OF: See *Turk v. Funk*, 30 Am. Rep. 771; *Anketel v. Converse*, 91 Am. Dec. 115; *Christy v. Dyer*, 81 Id. 493, note 497.

RENNER v. CANFIELD.

[36 MINNESOTA, 90.]

PARTY IS LIABLE ONLY FOR PROXIMATE AND DIRECT RESULTS OF HIS ACTS. Where person shoots a dog in the highway, and a woman standing near, whom he does not see at the time he fires, is so badly startled and frightened by the report of the gun as to seriously affect her health, the killing of the dog is in no sense the proximate cause of the injury to the woman.

APPEAL from an order denying the defendant a new trial. The opinion states the facts.

H. Jenkins, for the appellant.

Clapp, Woodard, and Cowie, for the respondent.

By Court, MITCHELL, J. As the defendant and one Ward were driving along the highway in front of plaintiff's premises, a dog belonging to the plaintiff's father (and which happened to be at that time on plaintiff's premises) rushed out upon the highway, and attacked Ward's dog. Defendant jumped out of his wagon with his gun, whereupon the dog of Renner, Sen., retreated towards or upon plaintiff's premises. While it was thus retreating, defendant fired at and killed it. This dog was accustomed to attack and worry the dogs of passing travelers on the highway, but there is no evidence that it ever attacked persons. When defendant shot the dog, he stood in the highway, about 175 feet from the plaintiff's house, which was situated on elevated ground some distance back from the road. The dog, when shot, was some 150 feet from the house. Plaintiff's wife was standing at the pump, at or near the side of the house, and saw the defendant shoot, but defendant did not see her, and was not aware of her presence, the view from the highway to the house being more or less intercepted by intervening trees. Mrs. Renner, being, owing to her pregnancy, in a delicate state of health, and her nerves very sensitive, was so startled and frightened as to seriously affect her health. Her fright seems to have been largely caused, or at least greatly aggravated, by the mistaken impression that defendant aimed his gun towards her, when in fact it was aimed at right angles to the direction where she was standing. For the damages resulting from this injury to his wife's health, plaintiff brings this action.

It is very difficult to determine, either from the complaint or the evidence introduced, or from the charge of the court,

the exact theory upon which this action was brought, tried, or submitted to the jury, — whether the *gravamen* of defendant's alleged tort was the killing of the dog, or negligence in firing off a gun in dangerous proximity to a human residence. The court did, however, expressly instruct the jury that the shooting of this dog by defendant was unlawful. He also instructed them that a person is liable for all the consequences "which flow naturally and directly from his acts"; and then left it to them to decide, as a question of fact, whether the injuries to plaintiff's wife were the "natural result of defendant's acts."

From this the jury could, and naturally would, understand that defendant might be liable in this action, from the mere fact that the killing of the dog was unlawful. We think a verdict for plaintiff could not be sustained on any such theory of the case. It is elementary that a man is liable only for the proximate or immediate and direct results of his acts. In strict logic, it may be said that he who is the cause of loss should be responsible for all the losses, whether proximate or remote, which flow from his acts. But in the practical workings of society, any such rule would be both impracticable and unjust, and therefore the law looks only to direct and proximate results, or, as the rule is sometimes stated, "Whoever does a wrongful act is answerable for the consequences that may ensue in the ordinary and natural course of events." There can be no fixed rule upon the subject that can be applied to all cases. Much must depend upon the circumstances of each particular case. But in this case it is very clear to us that the killing of this dog was in no sense the proximate cause of the injury to plaintiff's wife. The act in itself was not a tort of any kind against plaintiff, as the dog was not his property. The injury to the woman would have been presumably the same whether the killing of the dog was lawful or unlawful, and whether the defendant had fired at the dog, or at a bird in the air. If the acts of defendant amounted to any tort which, in any possible view of the case, could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. We are by no means prepared to say that, upon the evidence, a verdict for plaintiff could be sustained even

upon that ground. But it is enough here to say that the case was not submitted to the jury on any such theory.

Order reversed and new trial ordered.

DIRECT AND PROXIMATE DAMAGES ONLY ARE RECOVERABLE: See *Wallace v. Ah Sam*, 60 Am. Rep. 534; *Mitchell v. Clarke*, 60 Id. 529; *Jones v. Call*, 60 Id. 416; *Sitton v. Macdonald*, 60 Id. 484, note 488; *Willingham v. Hooven*, 58 Id. 435; *Pennington v. Western Union T. Co.*, 56 Id. 367; *Brigham v. Carlisle*, 56 Id. 28; *Wakeman v. Wheeler & W. M. Co.*, 54 Id. 676; *Lowery v. Manhattan R'y Co.*, 52 Id. 12; *White v. Conly*, 52 Id. 154, note 157, where other cases in that series are collected; *Seely v. Alden*, 100 Am. Dec. 642, note 645; *Peshine v. Shepperson*, 94 Id. 468, note 477, where other cases in that series are collected.

WHITNEY v. SALTER.

[86 MINNESOTA, 103.]

PURCHASE OF ENCUMBRANCE UPON, OR OF ADVERSE TITLE TO, ESTATE BY TENANT FOR LIFE in possession will be regarded as having been made for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold it for his own exclusive benefit, if the reversioner or remainderman will contribute his share of the sum paid.

IF LIFE TENANT OF RENEWABLE LEASEHOLD ESTATE RENEWS LEASE, the law will not permit him to do so for his own exclusive use, but will make him a trustee for the reversioner or remainderman. But if the life tenant pay out money that he was not required to pay, or more than his proportionate share, he becomes, to that extent, a creditor of the estate, and will be subrogated to the rights of the persons whose claims he has paid off. He and those claiming under him occupy a position analogous to that of a mortgagee in possession after condition broken, and cannot be ejected until all sums due him or them from the estate have been repaid.

ACTION brought by the plaintiff, as administrator with the will annexed of Ann Salter, deceased, to recover possession of certain real estate belonging to the estate of his testatrix. The plaintiff rested his right to recover on the following facts, which were admitted: In 1877, the owner of the land leased it to Ann Salter for the term of five years, with the right to successive renewals for terms of ten years until the end of one hundred years from the date of the lease. Later in the year 1877 Ann Salter died, leaving her husband, William Salter, and her children surviving her. In her will she devised the use and occupation of the land in question to her husband for life, in lieu of all estate, right, title, or interest he might otherwise have in her estate. William Salter died in 1886, before

the commencement of this action. Ann Salter's estate is unsettled and undistributed. The defendant gave in evidence, over the plaintiff's objection, the following facts: Prior to Ann Salter's death, she, her husband joining, mortgaged the premises. In 1880 the mortgage was foreclosed, and the premises sold to S. A. Reed, who conveyed the same, in 1882, to William Salter. In 1879 a mechanic's lien on the premises was foreclosed, and the premises were sold under the judgment to George McMullen, who, in 1880, assigned the certificate of sale to William Salter, who, in the same year, assigned it to John Steele. On April 21, 1882, the lease was renewed for ten years to William Salter, as the assignee and successor in interest of the original lessee. On February 4, 1885, John Steele, by quitclaim deed, conveyed the premises to William Salter, and on the 30th of October, 1885, William Salter, by quitclaim deed, conveyed them to Nancy Salter, the defendant, who is in possession thereunder. There was a verdict for the defendant, and the plaintiff appealed from an order refusing a new trial.

J. R. Corrigan, for the appellant.

Smith and Reed, for the respondent.

By Court, MITCHELL, J. The established doctrine is, that a tenant for life in possession, in the purchase of an encumbrance upon, or an adverse title to, the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold it for his own exclusive benefit, if the reversioner or remainderman will contribute his share of the sum paid. If the life tenant in such case pays more than his proportionate share, he simply becomes a creditor of the estate for that amount: 1 Washburn on Real Property, 96; *Davies v. Myers*, 13 B. Mon. 511. It is also the settled doctrine, that if a life tenant of a renewable leasehold estate renews the lease, the law will not permit him to do so for his own exclusive use, but will make him a trustee for the reversioner or remainderman. And this is so, even although he was not required to renew: Bissett on Estates for Life, 248. The renewed lease in such a case is subject to the same equities as the original. Thus far we agree with the appellant. But this is not the whole law applicable to the facts of this case. Salter, the life tenant, was under no obligation to pay off or

buy up these outstanding claims against the estate. The will under which he held the life estate imposed no such duty upon him. Neither did the law: 1 Washburn on Real Property, 96.

Whether in this case the life tenant should contribute towards the amount paid to remove these encumbrances is not here important. Undoubtedly, the general rule in regard to the apportionment of the contribution towards paying off encumbrances between the life tenant and the remainderman is, that the life tenant shall contribute in proportion to the benefit he derives from the liquidation of the debt: Story's Eq. Jur., sec. 487; 1 Washburn on Real Property, 96, 97.

In view of the fact that this life estate was given to Salter "in lieu of all estate, right, title, or interest" he might otherwise have in the estate of his wife, the testatrix, there may be some question whether he would be bound to contribute anything towards taking up these outstanding claims against the estate: See *Brooks v. Harwood*, 8 Pick. 497. But as the point is not really before us, we neither decide nor consider it. It is, however, certain, in any event, that Salter became a creditor of the estate for the amount he paid out, less his proportionate share, if any. To that extent he would be subrogated to the rights of the parties from whom he bought, and would be entitled to hold the property until the other parties interested paid their share. He and those claiming under him would occupy a position analogous to a mortgagee in possession after condition broken, who cannot be ejected until all sums due on the mortgage have been paid.

Order affirmed.

CO-TENANT PURCHASING ADVERSE TITLE OR REMOVING ENCUMBRANCE, RIGHTS OF: See *Fallon v. Chidester*, 26 Am. Rep. 164; *Horton v. Maffitt*, 100 Am. Dec. 222, note 227, where other cases in that series are collected.

SUBROGATION, WHAT IS, AND WHEN ARISES: See *Mosier's Appeal*, 93 Am. Dec. 783, note 788, where other cases in that series are collected.

WILSON v. MINNESOTA FARMERS' MUTUAL FIRE
INSURANCE ASSOCIATION.

[26 MINNESOTA, 112.]

ASSIGNMENT OF ERROR THAT COURT ERRED IN DENYING MOTION FOR NEW TRIAL is too general to be available.

INSURANCE COMPANY IS DEEMED TO HAVE WAIVED CONDITIONS OF POLICY making a misstatement as to encumbrances upon the property to avoid the insurance, where it had knowledge at the time of the application that the property was encumbered.

KNOWLEDGE OF FACT ACQUIRED BY AGENT AT TIME WHEN HE IS NOT ACTING AS SUCH, if actually had in mind by him when afterwards acting for his principal, will, as respects that transaction, be imputed to the principal.

WHERE COURT SUBMITS ISSUE OF FACT TO JURY ON EVIDENCE ASSUMED TO HAVE BEEN DIRECTED TO THAT FACT, and no exception is then taken, nor suggestion made that the subject referred to in the evidence was not shown to be identical with the subject in issue, it is too late, on appeal, to assign that as error on the part of the court.

ACTION on a policy of insurance issued by the defendant. The answer alleged that the applicant for insurance falsely represented that the property was unencumbered, whereas in fact it was mortgaged. The amended reply alleged that at the time of the making of the insurance the defendant had knowledge of the existence of the mortgage. The plaintiff had a verdict, and the defendant appealed from an order refusing a new trial.

Nelson, Reynolds, and Treat, and Bruckart and Reynolds, for the appellant.

Clapp, Woodard, and Cowie, for the respondent.

By Court, DICKINSON, J. The appellant's first assignment of error is, that the court erred in denying defendant's motion for a new trial. This is too general, and is of no avail. It is no assignment of error, within the meaning of the rule which contemplates a specification of the errors by reason of which the appellant asks a reversal of the order or judgment appealed from.

The second assignment of error cannot be sustained. Under the amendment made to the reply during the trial, it was competent for the plaintiff to show that the agent of the defendant knew, at the time the application was made, that the property was encumbered. The defendant, if chargeable with knowledge of the fact, would be deemed to have waived the conditions of the policy making a misstatement as to such fact to avoid the insurance: *Shafer v. Phoenix Ins. Co.*, 53 Wis.

361; 1 Wood on Fire Insurance, sec. 90. If the agent, although not acting as such when the information was communicated to him, retained a recollection of the fact, and had it in mind when effecting this insurance, such knowledge would affect the principal: *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322; Wade on Notice, sec. 687, and cases cited. The evidence, that a few days before the insurance the assured informed the agent who afterwards effected the insurance of the existing encumbrance, was therefore admissible, even though that alone were deemed insufficient to charge the defendant with notice.

When the exception referred to in the third assignment of error was taken, the court qualified the instruction excepted to, and to the instruction as thus qualified no exception was taken.

It was admitted by the pleadings that when the insurance was effected there was a mortgage upon the property for eight hundred dollars, and interest, given to the Dundee Mortgage Trust Investment Company. The only evidence of notice to the agent of an existing encumbrance referred to a mortgage of \$850, in favor of MacMaster, in Fergus Falls. It was not shown that these different designations referred to and were the same mortgage. The fourth assignment of error rests upon the fact that no such identity was shown. The point is, in substance, that the court erred in submitting to the jury the question as to whether the defendant had notice of the Dundee mortgage. As to this, it is enough to say that the court submitted the case to the jury as though the mortgage designated in the pleadings, and that to which the evidence related, were the same. No suggestion was then made that such was not the fact, no exception was taken to the instruction in this respect, and it is now too late to assign this as error on the part of the court.

The assignment of errors contains no other specifications than those to which we have referred, and the order refusing a new trial is affirmed.

WAIVER OF STIPULATIONS IN POLICY OF INSURANCE: See *Havens v. Home Ins. Co.*, 60 Am. Rep. 689; *Pomeroy v. Rocky Mountain I. & S. I.*, 59 Id. 144; *Northwestern M. L. I. Co. v. Amerman*, 59 Id. 799; *Alexander v. Continental I. Co. of New York*, 58 Id. 869; *American Central Ins. Co. v. McCrea*, 41 Id. 647; *Carrigan v. Lycoming F. I. Co.*, 38 Id. 687; *Dayton Ins. Co. v. Kelly*, 15 Id. 612; *Hayward v. National Ins. Co.*, 14 Id. 400; *Security Ins. Co. v. Fay*, 7 Id. 670; *Helms v. Philadelphia L. I. Co.*, 100 Am. Dec. 621, note 625, where other cases in that series are collected.

GUNN v. PEAKES.

[36 MINNESOTA, 177.]

COMPLAINT ON FOREIGN JUDGMENT NEED NOT ALLEGE THAT COURT THAT RENDERED IT HAD JURISDICTION either of the cause or the parties. A judgment of a foreign court, complete and regular on its face, is *prima facie* valid.

FOREIGN JUDGMENT MAY BE PROVED BY COPY THEREOF, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy.

CLERK OR PROTHONOTARY OF COURT IS PRESUMED TO HAVE AUTHORITY TO MAKE AND CERTIFY COPIES of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature and the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof.

GREAT SEAL OF STATE OR GOVERNMENT PROVES ITSELF. JUDGMENT THAT "ACTION BE DISMISSED WITHOUT PREJUDICE to another action" is, by its terms, no bar to a subsequent action for the same cause. And it makes no difference whether the saving clause was properly or improperly attached to the judgment.

ACTION on a foreign judgment. The only evidence offered by the defendant was the record of a former action on the same judgment, which resulted in the judgment of dismissal referred to in the opinion. Other facts are stated in the opinion.

Charles J. Bartleson, for the appellant.

Kitchel, Cohen, and Shaw, for the respondent.

By Court, **BERRY, J.** This is an action upon a foreign—a Nova Scotia—judgment. A judgment of a foreign court, complete and regular upon its face, is *prima facie* valid: *Walker v. Witter*, 1 Doug. 1; *Reynolds v. Fenton*, 3 Com. B. 187; *Barber v. Lamb*, 8 Com. B., N. S., 95; *Robertson v. Struth*, 5 Q. B. 941; *Shumway v. Stillman*, 4 Cow. 292; 15 Am. Dec. 374; 6 Wend. 447; *Lazier v. Westcott*, 26 N. Y. 146; 82 Am. Dec. 404; *Bissell v. Wheelock*, 11 Cush. 277; *Holt v. Alloway*, 2 Blackf. 108; *Crepps v. Durden*, 1 Smith's Lead. Cas., 8th Am. ed.; 1079, 1143; *Duchess of Kingston's Case*, 2 Id. 734, 981; *Dozier v. Joyce*, 8 Port. 303; Whart. Ev., secs. 804, 1302, 1303. It follows that a complaint upon such foreign judgment need not allege that the court by which it was rendered had jurisdiction either of the cause or the parties: *Robertson v. Struth*, *supra*; Whart. Ev., secs. 804, 1302, 1303; 2 Chit. Pl. 244, and note y. As to this matter of pleading, *Karns v. Kunkle*, 2 Minn. 268 (313), is wrong, both in reason and upon authority.

A foreign judgment may be proved by a copy thereof, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy: 1 Greenl. Ev., sec. 488; *Mahurin v. Bickford*, 6 N. H. 567; *Church v. Hubbard*, 2 Cranch, 187, 237; *Dozier v. Joyce*, *supra*.

The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature, and by the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. The great seal proves itself: *Lazier v. Westcott*, *supra*.

The copy of the record received in evidence upon the trial of the case at bar was sufficiently authenticated, within the rule stated, and it proves the judgment to which this action relates. The official signature of the prothonotary and the seal of the court are authenticated as such, and as what they purport to be, by the great seal of the province of Nova Scotia affixed to the certificate of the keeper of the great seal, viz., the lieutenant-governor of the province. Upon the face of the records, the prothonotary and seal purport to be the prothonotary and seal of a duly constituted court of record of the province of Nova Scotia. The record is upon its face complete and regular, showing the commencement and pendency of an action for the recovery of money upon a promissory note and other causes of action alleged, service of summons therein upon the defendant, and his appearance, together with other proceedings culminating in a money judgment against defendant, duly entered. This was ample proof of a valid judgment.

We attach no importance to the circumstance that what appears as the judgment in the copy of the record is followed by the name or signature of the plaintiff's attorney. Whatever may be the purpose of the name or signature, ostensibly the judgment is duly entered as such in the record. Very likely the signature of the attorney is affixed under some such common-law usage as is referred to in Tidd's Practice, 568, 569, 903, 904, 930, and in 4 Chitty's Practice, 107. But whatever its purpose, it does not affect the actual entry of the judgment in the record.

The judgment in a former action, which is set up in bar of the present, was, that "the action be dismissed without preju-

“dice to another action.” Such a judgment is by its terms no bar. Whether, with reference to the stage of the proceedings at which the action was dismissed, it was proper to attach any such saving clause to the dismissal, is not important. The former judgment must be pleaded and taken for what it is, and not for what it ought to have been.

Judgment affirmed.

ACTION ON FOREIGN JUDGMENT, DEFENSES AVAILABLE IN: See *Hanley v. Donoghue*, 43 Am. Rep. 554; *Bowler v. Huston*, 32 Id. 673; *Gilman v. Gilman*, 30 Id. 646; *Eaton v. Hasty*, 29 Id. 365; *Sewall v. Sewall*, 23 Id. 299; *Prosser v. Warner*, 19 Id. 132; *Marz v. Fore*, 11 Id. 432, note 435; *McLaren v. Kehler*, 8 Id. 591; *Hoffman v. Hoffman*, 7 Id. 299, note 302; *Klanter v. Kinnier*, 6 Id. 132; *Latimer v. Union Pacific R'y E. D.*, 97 Am. Dec. 378; *Folger v. Columbian Ins. Co. and Trustees*, 96 Id. 747; *Clemmer v. Cooper*, 95 Id. 720, note 722, where other cases in that series are collected; *Walton v. Sugg*, 93 Id. 580, note 583; *Rankin v. Goddard*, 89 Id. 718, note 720.

COMPLAINT ON FOREIGN JUDGMENT NEED NOT AVER JURISDICTION IN COURT RENDERING IT: See *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446, note 450, where other cases in that series are collected.

AUTHENTICATION OF FOREIGN JUDGMENT: See *Taylor v. Barron*, 64 Am. Dec. 281, note 290, where other cases in that series are collected; *Lanier v. Westcott*, 82 Id. 404, note 411, where this subject is considered at length; *Hutchins v. Gerrish*, 13 Am. Rep. 19.

DAVIS v. KOBE.

[36 MINNESOTA, 214.]

FACTOR TO WHOM WHEAT IS CONSIGNED FOR STORAGE IN ELEVATOR, and for sale, may store it in a mass in a bin with other wheat of the same grade and quality, in the absence of instructions from the consignor to the contrary.

COURTS TAKE JUDICIAL NOTICE THAT IT IS CUSTOMARY TO STORE WHEAT IN MASS with other wheat of the same grade and quality in general commercial elevators.

FACTOR IS NOT RESPONSIBLE TO HIS PRINCIPAL FOR DIFFERENCES IN GRADES of grain, in the market to which it is consigned, from those established at other places, in the absence of special instructions. The principal assumes the risk of that when he selects his market.

FACTOR WHO HAS MADE LARGE ADVANCES TO HIS PRINCIPAL upon property consigned to him for sale, which property has become doubtful security for his reimbursement, and who has repeatedly demanded repayment of his advances, or security therefor, without compliance by the principal, may, after reasonable notice to his principal, with reasonable discretion and in good faith, sell the property, although directed by the principal to hold it longer.

ACTION TO RECOVER A BALANCE OF ACCOUNT for disbursements, charges, commissions, and advances on wheat consigned by

the defendant to the plaintiff at Duluth, and which had been sold by the latter, some of it against the defendant's instructions. The plaintiff had a verdict, and the defendant appealed from an order refusing a new trial. Other facts are stated in the opinion.

Bruckart and Reynolds, for the appellant.

W. W. Billson, for the respondent.

By Court, DICKINSON, J. A factor or commission merchant, to whom wheat is consigned for storage in an elevator, not a private warehouse, and for sale, may store it in a mass in a bin with other wheat of the same grade and quality, in the absence of instructions from the consignor to the contrary. It has become a matter of common knowledge that such is the customary manner of storing wheat in our general commercial elevators, and of this the courts should not affect ignorance, but should take judicial notice without proof. The fact that the wheat is of the grade known as "condemned" creates no exception to the rule. There was therefore no error in that part of the charge of the court referred to in the appellant's first assignment.

The court did not err in instructing the jury that if the consignor shipped this grain to his factor at Duluth to be sold there, and the grade at Duluth was not as good as at the place of shipment, the consignor must bear the loss, in the absence of special instructions to his factor. This was only saying, in other words, that the factor, in executing his agency by selling in the Duluth market, would not be responsible to his principal in respect to the grades established at that place. The principal assumed the risk of that when he selected his market.

The court properly instructed the jury that the factor was justified in selling the wheat, notwithstanding the request of the principal to hold it longer. Ordinarily the agent would be bound to obey the instructions of his principal as to the time of selling. But it was shown that the factor had made large advances to his principal upon this wheat; that the grain was of doubtful sufficiency as security for what was due to the factor on account thereof; that the factor had repeatedly demanded repayment of his advances, or security for the same, as a condition of his continuing to hold the wheat, notifying his principal that he should sell if his demand was not

complied with; and that, although reasonable notice had been given, the principal had neglected to reimburse or secure the agent. Under such circumstances, the factor had a right, acting in good faith, and with reasonable discretion, with regard both to the reimbursement of himself and the interest of his principal, to sell the property: *Brown v. McGran*, 14 Pet. 479; *Feild v. Farrington*, 10 Wall. 141; *Parker v. Brancker*, 22 Pick. 40.

From what has already been said, it follows that the charge was correct, that if there were no special instructions as to a separate storage of the grain, and if it sold for a fair price, the verdict should be for the plaintiff. In other words, the factor being justified in selling and having sold for a fair price, the principal is not, because of such sale, entitled to recover against the factor.

Order affirmed.

RIGHT OF FACTOR WHO HAS MADE ADVANCES TO SELL: See *Phillips v. Scott*, 97 Am. Dec. 369, note 374; *Baugh v. Kirkpatrick*, 93 Id. 675; *Benny v. Rhodes*, 59 Id. 293; *Blot v. Boiceau*, 51 Id. 345, note 351, where other cases in that series are collected.

JUDICIAL NOTICE OF GENERAL USAGES OF BUSINESS: See note to *Lanfear v. Mestier*, 89 Am. Dec. 664, where this subject is considered.

GRAIN IN MASS IN WAREHOUSE: See *Dole v. Olmstead*, 85 Am. Dec. 397, note 401, where other cases in that series are collected.

PECK v. McLEAN.

[86 MINNESOTA, 228.]

ONE TENANT IN COMMON OF PERSONAL PROPERTY MAY SEPARATELY MAINTAIN ACTION for a wrong done to it, if his co-tenants refuse to join with him as plaintiffs, and they are non-residents of and are without the state. ERRONEOUS JUDGMENT IS VALID UNTIL REVERSED, AND PROTECTS PLAINTIFF in enforcing it.

DEFENDANT, AFTER REVERSAL OF ERRONEOUS JUDGMENT AGAINST HIM, IS ENTITLED TO RESTITUTION of only so much as the plaintiff has received upon the execution levied thereunder.

APPEAL from an order sustaining a demurrer. The opinion states the case.

J. D. Springer, for the appellant.

Flandrau, Squires, and Cutcheon, for the respondents.

By Court, GILFILLAN, C. J. This cause comes here upon an order sustaining a demurrer to the complaint. The questions

raised by the demurrer are, that there is a defect of parties, and that the complaint does not state facts sufficient to constitute a cause of action. The case stated by the complaint is this: Plaintiff was the owner of seven eighths, and Mary F. Aiken of one eighth, of the steamboat Nellie Peck. Plaintiff was the owner of three fifths, and John H. Charles, as trustee, of two fifths, of the steamboat General Meade. Plaintiff was the owner of three fourths, and H. C. Aiken of one fourth, of the steamboat General Terry. In January, 1883, the defendants commenced, in the district court of the United States for the district of Nebraska, an action *in rem* against each of said steamboats, to recover for supplies furnished, and the vessels were taken on mesne process. The said owners filed answers. In July, 1883, a decree was entered by said court in each of said actions, directing the vessel to be sold to satisfy the amount found to be a lien upon it. The owners, in July, 1883, took an appeal in each of said actions to the circuit court of the United States. In October, 1883, at the instance of these defendants, process was issued upon such decree in each of said actions, and upon such process each of the vessels was sold. The amount for which it was sold is stated, but it is not alleged that any part of such amount was paid to these defendants. In August, 1884, the circuit court entered a decree in each action, reversing the decree of the district court.

The plaintiff resides in Iowa, the defendants in Dakota, Mary F. and H. C. Aiken in Nebraska, John H. Charles in Pennsylvania. Plaintiff's co-owners are none of them within the state, or within the jurisdiction of its courts, and they all refuse to join with her in any action or actions in the premises.

The questions presented in the case are, Can plaintiff maintain the action under the circumstances without making her co-owners parties? And if so, can she recover, the defendants not having received any part of the money for which the vessels sold?

The fact that the co-owners are not within the jurisdiction, and cannot be brought in as defendants, is a sufficient reason for not making them defendants, if, in a case like this, that might otherwise be done under our practice. Such being the case, is it absolutely essential that they be made plaintiffs? The statute (Gen. Stats. 1878, c. 66, sec. 26) provides that "every action shall be prosecuted in the name of the real party in interest." But where there are several who are en-

titled to the benefit of the relief sought, i. e., several real parties in interest, whether they must all be joined, or whether, under peculiar circumstances, one of them may sue alone, must be determined by the law as it was before the statute, for the latter does not provide for such a case. The general rule is stated by Chitty. "When two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must, in general, join in the action, or the defendant may plead in abatement": 1 Chit. Pl. *64. As to tenants in common, a distinction has always existed between actions for the realty and personal actions. "When the action is in the realty, they must sue separately; when in the personalty, they must join": *Hill v. Gibbs*, 5 Hill, 56; Co. Lit. 198 a. The rule applies to part owners of ships. "Whether the action be in contract or in tort, for services rendered by or for injuries done to their ship, all should join in its prosecution": Freeman on Cotenancy, sec. 387.

It will be seen that Chitty states the rule as "in general," implying that there may be exceptions to it; and unless there may be exceptions, it is apparent that what is only a rule of practice, affecting only the mode of proceeding to redress a wrong, will sometimes operate to altogether prevent a remedy. The reason for the rule — to protect defendants against multiplicity of suits — is good. But if, adhered to, it will in a particular case cause a failure of justice, the reason for departing from it is stronger than that for the rule. It is better that a defendant should be put to the danger and inconvenience of several suits than that a plaintiff should be deprived of a remedy. So where a third person colluded with a partner in a firm to injure the other partners, they might, without joining their partner, maintain an action against the third person: *Longman v. Pole*, 1 Moody & M. 223.

An instance of an exception allowed of necessity to the general rule as to parties was in the case of *femes covert*. Thus the wife was permitted to sue alone where the husband was in exile: Co. Lit. 132 b; or had abjured the realm: *Wilmot's Case*, Moore, 851; *Dubois v. Hole*, 2 Vern. 613; or where he was an alien enemy: *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147; or where he, a foreigner, never in the United States, had deserted her in a foreign country: *Gregory v. Paul*, 15 Mass. 31.

We are not cited to, and do not find, any case like this; but the reason for holding it an exception to the general rule is as

strong as could ever exist in any case, as plaintiff's co-owners are out of the jurisdiction, and therefore cannot be brought in as defendants; and as they refuse to join as plaintiffs, she will be entirely without remedy, if we rigidly apply the general rule. The case comes within the reason for making an exception, and we regard it as such. The ground of demurrer that there is a defect of parties is not well founded.

There is some variance in the authorities on the question whether a defendant in an erroneous judgment may, after its reversal, recover the full value of his property sold on an execution upon the erroneous judgment before its reversal, or only so much as the plaintiff has realized upon the execution. It seems to us that the decisions holding the latter are more in accordance with principle, for the erroneous judgment is valid until reversed. It is the act of the court, and the party may, until reversal, justify under a regular execution upon it: *Bank of U. S. v. Bank of Washington*, 6 Pet. 8. This is the generally recognized rule. After a reversal, the plaintiff is bound to make restitution,—that is, to return to the defendant whatever he got by means of the judgment; but he cannot be treated as a wrong-doer for causing execution to issue, and the defendant's property to be levied on and sold. It protects him while it remains in force. It may seem a hardship to the defendant in such a judgment that under it his property may be sold for greatly less than its value, and his right of restitution be limited to what came into the hands of the plaintiff. But such hardship, when it occurs, will generally, if not always, be the result of his own acts. If, by failing to appeal, or to obtain a *supersedeas* on an appeal, he permits the judgment to remain in force and enforceable, he can hardly complain that the other party proceeds to enforce it. To entitle the defendant to restitution, it must appear that the money has been paid to the plaintiff: *Eubank v. Ralls*, 4 Leigh, 308. Among the cases holding as we do, we may refer to the following: *Gay v. Smith*, 38 N. H. 171; *Bickerstaff v. Dellinger*, 1 Murph. 272; *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Eyre v. Woodfine*, Cro. Eliz. 278; *Westerne v. Creswick*, 4 Mod. 161; *Lovett v. German Ref. Church*, 12 Barb. 67; *McGuire v. Ely*, Wright, 520.

For the reason, then, that the complaint does not show that any money came into the hands of these defendants, it does not state any cause of action.

Order affirmed.

ACTION BY ONE CO-TENANT AGAINST THIRD PERSON: See *Hines v. Robinson*, 99 Am. Dec. 772; *Mobley v. Bruner*, 98 Id. 360, note 363, where other cases in that series are collected.

AFTER REVERSAL OF JUDGMENT, PARTY AGAINST WHOM IT WAS RENDERED IS ENTITLED TO FULL RESTITUTION: See *Smith v. Zent*, 43 Am. Rep. 61; *Carson v. Suggett*, 86 Am. Dec. 112, note 114, where other cases in that series are collected. But money paid in satisfaction of a judgment, upon a compromise and settlement thereof, cannot be recovered back upon a reversal of the judgment: *Kaufman v. Dickensheets*, 95 Am. Dec. 694.

SMITH v. WILSON.

[86 MINNESOTA, 334.]

FACT THAT TESTIMONY OF WITNESS DIFFERS IN SOME IMPORTANT PARTICULARS from that given by him on a former trial of the case is not sufficient to justify the appellate court in setting aside a verdict resting upon such testimony, which the trial court has refused to disturb.

IT IS NOT NEGLIGENCE IN LAW FOR GUEST AT HOTEL TO RETAIN \$495 IN BELT on his person while sleeping in a room by himself, although the bolt of the door to his room could be opened by a wire from the outside.

INNKEEPER'S LIABILITY IN RESPECT TO HIS GUEST'S MONEY IS NOT LIMITED TO SUCH SUM as is necessary for the guest's traveling expenses.

ALLEGED IMPROPRIETY OF REMARKS OF ATTORNEY IN ARGUMENT TO JURY will not be considered as a ground of error, when presented by affidavit merely, and not as part of a settled case or bill of exceptions.

ACTION to recover \$495 alleged to have been stolen from the plaintiff while a guest in the defendant's hotel, and while he was asleep in his room, the door of which he had bolted, the bolt, however, proving insecure. The answer put in issue the averments of the complaint, and alleged that defendant had complied with the statutory condition of exemption from liability by providing a sufficient safe, and keeping posted the statutory notice, and providing locks and bolts for all room doors, etc. The plaintiff had a verdict for the full amount claimed. The defendant moved for a new trial, on the ground that the evidence did not justify the verdict, and for misconduct of the prevailing party, supporting the latter ground by the defendant's affidavit as to improper and prejudicial comments of the plaintiff's attorney in his closing address to the jury concerning the character of the defendant's hotel. These remarks were not in the settled case. The motion was denied, and the defendant appealed.

O'Brien and O'Brien, for the appellant.

C. D. O'Brien, for the respondent.

By Court, DICKINSON, J. The point that the verdict was not justified by the evidence presents the question whether it is apparent, upon the review of the case, that the testimony of the plaintiff as to the possession of the money alleged to have been taken from his person, and as to the fact of the robbery, was unworthy of belief by the jury. If it was credible, it clearly justified the verdict. Its most apparent infirmity was, that in some important particulars it was different from the testimony of the same witness upon a former trial, as to the source from which he received the money. The discrediting facts, which the testimony of the plaintiff tended to explain away, were properly placed before the jury for their consideration. They are not sufficient to justify us, upon a review of the record, in setting aside the verdict which the trial court has refused to disturb.

There is nothing in the alleged negligence of the plaintiff which was not clearly subject to the determination of the jury upon the evidence. The fact that, sleeping in a room at the hotel occupied only by himself, the plaintiff retained the sum of \$495 in money secured in a belt around his body, was not such conduct as should be deemed negligence as a matter of law, although the bolt of the door to his room could be opened with a wire from the outside.

The evidence went to show, and after verdict it must be taken to have been the fact, that the defendant had not complied with the statutory conditions so as to have protected himself from the common-law liability of innkeepers. The responsibility of the innkeeper in respect to the money of his guest was not limited to such an amount as was necessary for the guest's traveling expenses: *Armistead v. Wilde*, 17 Q. B. 261; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Wilkins v. Earle*, 44 N. Y. 172; 3 Am. Rep. 655; *Quinton v. Courtney*, 1 Hayw. (N. C.) 40; *Redfield on Carriers*, 598-605; *Pinkerton v. Woodward*, 33 Cal. 557, 600; 91 Am. Dec. 657.

The alleged impropriety in the remarks of the respondent's attorney in his argument to the jury has not been shown by the settled case, and will not be considered upon affidavit merely.

Order affirmed.

INNKEEPER'S LIABILITY FOR GUEST'S GOODS OR MONEY: See *Rubenstein v. Cruikshanks*, 52 Am. Rep. 806; *Murchison v. Sargent*, 47 Id. 754; *Dunbar v. Day*, 41 Id. 772; *Adams v. Clem*, 5 Id. 524; *Wilkins v. Earle*, 4 Id. 655; *Ramaley v. Leland*, 3 Id. 728; *Houser v. Tully*, 1 Id. 390; *Read v. Amidon*, 98 Am. Dec. 560, note 562, where other cases in that series are collected; *Vance v. Throckmorton*, 96 Id. 327, note 330.

PYE v. CITY OF MANKATO.

[36 MINNESOTA, 373.]

CITY IS LIABLE FOR COLLECTING AND GATHERING UP SURFACE WATER by artificial means, such as sewers and drains, and casting it upon the premises of another in increased and injurious quantities.

ACTION to recover damages for an injury to the plaintiff's lot. The plaintiff had judgment, and the defendant, having moved for a new trial which was denied, appealed. The other facts are stated in the opinion.

James Brown, for the appellant.

Daniel Buck, and Collester and Foster, for the respondent.

By Court, MITCHELL, J. The ground on which a new trial was asked, and the only point urged in this court, was, that "the decision of the court is not justified by the evidence, and is contrary to law." As counsel for appellant nowhere indicates wherein the decision is not justified by the evidence, we shall assume that the findings of fact are supported by the evidence, thus leaving as the only question for consideration whether these findings justify the conclusion of law that plaintiff is entitled to recover. We shall assume, in favor of appellant, that this was "surface water," and not a "water-course." Indeed, upon the facts found by the court, there is no doubt whatever upon this point.

The material facts found are, that originally this water, following a depression in the ground, flowed southerly, across Washington Street (easterly of plaintiff's premises), and from thence finally found its way into the Minnesota River; that the city graded up Washington Street some two feet above the natural surface of the ground, thus intercepting the flow of the water, as formerly, across that street. The city also constructed a gutter on the north side of Washington Street, into which to gather up and carry this water westerly, and past plaintiff's premises (which abutted on the north side of Washington Street), into the river; that this gutter was negligently and wrongfully constructed, wholly insufficient in capacity to contain and carry off the water, and as a consequence it overflowed and was cast in large and injurious quantities upon the land of plaintiff.

The law upon the subject of the liability of municipal corporations for injuries to private property, in consequence of being overflowed with surface water caused by improvements

made or work done upon streets, is left in a state of great uncertainty by the adjudicated cases, among which there is much conflict. It is impossible to reconcile all of the cases on the subject, and hence we will confine ourselves to the statement of certain principles, which we think are settled by our own decisions, and then attempt to apply these principles to the facts of this case; and,—

1. We hold that a municipal corporation is liable for damages caused to private property by grading streets when a private owner of the soil over which the streets are laid would be liable if improving it for his own use: *O'Brien v. City of St. Paul*, 25 Minn. 331; 33 Am. Rep. 470; *Dyer v. City of St. Paul*, 27 Minn. 457; 8 N. W. Rep. 272; *McClure v. City of Red Wing*, 28 Minn. 186; 9 N. W. Rep. 767; *Henderson v. City of Minneapolis*, 32 Minn. 319; 20 N. W. Rep. 322.

2. We do not admit the doctrine of servitudes of the civil law, but have adopted the common-law rule that surface water is a common enemy, which each owner, in the necessary and proper improvement of his land, may get rid of as best he may, subject, however, to the restriction of the maxim that a man must so use his own as not unnecessarily to injure another: *Alden v. City of Minneapolis*, 24 Minn. 254, 262; *O'Brien v. City of St. Paul*, 25 Id. 331; 33 Am. Rep. 470; *Hogenson v. St. Paul, M., & M. R'y Co.*, 31 Minn. 224; 17 N. W. Rep. 374; and consequently,—

3. A city is not liable for consequential injuries to adjoining property, resulting from raising the grade of a street, although the result may be to interfere with the flow of surface water, and cause it to accumulate on the premises of another: *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. City of Minneapolis*, 24 Id. 254, 263; *O'Brien v. City of St. Paul*, *supra*; *Henderson v. City of Minneapolis*, *supra*.

4. Neither is a city liable for wholly failing to provide drainage or sewerage, nor for a mere error of judgment as to the plan of drainage, nor for the insufficient size or capacity of drains or gutters for the purpose intended, at least if the adjoining property is not in any worse condition than if no gutters or drains whatever had been constructed: *Alden v. City of Minneapolis*, *supra*; *McClure v. City of Red Wing*, *supra*; *Henderson v. City of Minneapolis*, *supra*.

5. But a city will be liable if it collects and gathers up surface water by artificial means, such as sewers and drains, and casts it upon the premises of another in increased and inju-

rious quantities. Such an act amounts to a positive trespass: *O'Brien v. City of St. Paul*, 18 Minn. 163 (176); *Kobs v. City of Minneapolis*, 22 Id. 159; *O'Brien v. City of St. Paul*, 25 Id. 331; *McClure v. City of Red Wing*, 28 Id. 186; 9 N. W. Rep. 767; *Hogenson v. St. Paul, M., & M. R'y Co.*, 31 Minn. 224; 17 N. W. Rep. 374.

Upon the facts as found by the court, we think this case falls within the principle last stated. The city would not have been liable merely for interfering with the flow of surface water by raising the grade of Washington Street. Neither would it probably have been liable if it had omitted entirely to construct a drain or gutter for this water, nor if, by constructing a gutter of inadequate capacity, it had left plaintiff's premises in no worse condition than if it had failed to construct one at all. But in this case it is not strictly the failure to construct adequate gutters to carry off the water that is complained of; but what is complained of is the positive act of casting water, in large and injurious quantities, upon plaintiff's land (which otherwise would not have gone there), by means of this gutter,—an act which amounted to a positive invasion of his property. Upon neither principle nor authority is there an exemption from liability when an individual has received an injury, accomplished by a corporate act which is in the nature of a trespass upon his property. It is immaterial whether this gutter was expressly constructed in order to cast this water on plaintiff's land, or whether it was so constructed that the flooding must be the necessary result. Having, after intercepting the natural flow of this water, undertaken to gather up and conduct it in another direction, by an artificial channel, it was incumbent on the city to use reasonable care to do this in such a way as not to cause a positive trespass upon the lands of others. To fail to do this is negligence. Such was the fact in this case, and this brings it within the principle of the cases last cited. See also *Ashley v. Port Huron*, 85 Mich. 296; 24 Am. Rep. 552.

Order affirmed.

DEFECTIVE SEWERS, CITY WHEN LIABLE FOR: See *Rice v. City of Evansville*, 58 Am. Rep. 22; *City of Fort Wayne v. Coombs*, 57 Id. 82; *Morris v. City of Council Bluffs*, 56 Id. 343; *Seifert v. City of Brooklyn*, 54 Id. 664, note 671; *Heth v. City of Fond du Lac*, 53 Id. 279; *Gilluly v. City of Madison*, 53 Id. 299; *Semple v. Vicksburg*, 52 Id. 181; *Freburg v. City of Davenport*, 50 Id. 737; *City of Evansville v. Decker*, 43 Id. 86; *Hardy v. City of Brooklyn*, 43 Id. 182; *City of Denver v. Capelli*, 34 Id. 62; *Fair v. City of Philadelphia*, 32 Id. 455; *Franklin*

W. Co. v. Portland, 24 Id. 1; *Ashley v. City of Port Huron*, 24 Id. 552, note 556, where prior cases in that series are collected; *Nevins v. City of Peoria*, 89 Am. Dec. 392, note 401, where other cases in that series are collected; *Stackhouse v. City of Lafayette*, 89 Id. 450, note 457.

LEWIS v. WETHERELL.

[86 MINNESOTA, 386.]

VALID MORTGAGE OF LAND ENTERED AS HOMESTEAD UNDER LAWS OF UNITED STATES may be made by the claimant after he has received his final certificate, and before the patent therefor has been issued to him.

ACTION to recover possession of land purchased at a mortgage sale. The opinion states the case.

B. F. Hartshorn, for the appellant.

Gates and Kelsey, for the respondent.

By Court, GILFILLAN, C. J. The defendant made a "homestead entry" upon a quarter-section of land under the laws of the United States, lived upon and improved the land, made the final proof, and on May 4, 1882, received the final certificate entitling him to, and upon which he some time afterwards received, a patent for the land. May 6, 1882, he, with his wife, executed to plaintiff a mortgage upon the land, containing the usual power of sale, and covenants of warranty, etc. February 13, 1885, plaintiff duly foreclosed the mortgage under the power, bid in the land at the sale, received the proper certificate of sale from the sheriff making the same, and there was no redemption.

The defendant claims that the mortgage was void, under the provisions in section 2296, Revised Statutes of the United States, that "no lands acquired under the provisions of this chapter shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." It was held in *Townsend v. Fenton*, 30 Minn. 528, 16 N. W. Rep. 421, that an agreement made before the patent issued to convey the land after it should issue was valid; and in *Moore v. McIntosh*, 6 Kan. 39, that the party making the entry has, after he is entitled to a patent, but before it issues, a conveyable interest in the land; and in *Nycum v. McAllister*, 33 Iowa, 374, *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487, and *Jones v. Yoakam*, 5 Id. 265, that a mortgage executed by him, after he is entitled to a patent, but before it has issued, is

valid. These cases, we think, were decided on a correct interpretation of the statute.

The provision we have quoted was manifestly intended for the protection of the party entering the land, to prevent its appropriation *in invitum* to the satisfaction of his debts, and not for the purpose of disabling him from dealing with it as his own after he has acquired a right to it by complying with the terms of the law. The only restraint which the statute seems to impose on the party's power of disposition applies only to a time before he makes his final proofs: See sec. 2291. The mortgage was therefore valid.

Judgment affirmed.

MORTGAGE OF FEDERAL HOMESTEAD: See *Kirkaldie v. Larrabee*, 89 Am. Dec. 205, note 206.

CRAVER v. CHRISTIAN.

[36 MINNESOTA, 413.]

WHETHER SERVANT ASSUMED RISK OR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE cannot be determined by a trial court as a matter of law, but must be submitted to the jury as a question of fact, in a case where the evidence shows that certain dangerous parts of the machinery in an extensive flour-mill, which had been, to the plaintiff's knowledge, formerly covered, were, at the time of the accident therefrom to him, and had been for several days prior thereto, uncovered for the purpose of making repairs, and that plaintiff had not been notified of the removal of the covering, the character of his duties being such as to reasonably distract his attention from the condition of the gearing on any particular machine, and it not being his duty to look after the repairs, or to keep the machinery in order.

ACTION to recover damages for personal injuries. The plaintiff had a verdict, the defendants moved for a new trial, which was denied, and they appealed. The other facts are stated in the opinion.

P. M. Babcock, for the appellants.

Weed, Munro, and Edwin Stone, for the respondent.

By Court, VANDERBURGH, J. The principles involved in the cases of *Sherman v. Chicago, Mil., & St. Paul R'y Co.*, 34 Minn. 259, *Craver v. Christian*, 34 Id. 397, and *Barbo v. Bassett*, 35 Id. 485, and which were considered by this court in the determination thereof, will necessarily lead to an affirmation of the order refusing a new trial in this case.

It will be seen that the liability of the defendants in these cases is not rested solely upon the ground that the machinery or instrumentalities provided were not fenced or covered, but rather upon the ground that, assuming that the evidence tended to show that the machinery used or place of employment was unsafe and dangerous to the servant, the jury might find that the master had failed in some duty which he owed the servant, so that it might be determined that the latter did not assume the risk of the danger incident to the use of the machinery.

In *Anderson v. Morrison*, 22 Minn. 274, it was held that "if an employer should set an adult, who had capacity to take care of himself, and who knew the risks, to do a dangerous work, of course the employer would not be liable for an injury occurring to the employee in doing the work; and it would be the same if the employee were a minor, but of sufficient capacity to avoid the danger." And so the rule is stated generally in *Sullivan v. India Mfg. Co.*, 113 Mass. 396: Neglect to fence or cover is not of itself sufficient to make the master liable. He must have been guilty of some negligence in the premises, thus failing in some duty owed to the employee. "He went to work in the place pointed out by the defendants. He thus consented to the dangers attending the work, all of which were apparent; and if he had sufficient knowledge and capacity to comprehend them, he cannot now complain that such place might, at moderate expense, have been made safer."

The question resolves itself, then, into one in respect to the negligent conduct of the master under the circumstances of each particular case. It must be conceded, therefore, if the machinery is in fact found to be dangerous, that the duties growing out of the relations of master and servant in any particular case, as respects the use of it, are not affected by the fact that similar machinery is ordinarily left unprotected by other employers. Nor is it material that the original object of covering the gearing alleged to be dangerous, and by which plaintiff was injured, was to keep out dust, if the result was to afford protection, and the plaintiff was not notified, either in fact or by the circumstances, of the removal of such protection. It is manifest that, if practicable, dangerous machinery should be covered so as to remove the risk; or if not done, that the employee should have reasonable notice of the risks incurred by it: *Russell v. Minn. & St. Louis R'y Co.*, 82 Minn. 230; 20 N. W. Rep. 147.

In *Barbo v. Bassett, supra*, the cogs by which the plaintiff's hand was injured had been uncovered subsequent to his employment, without his knowledge, and he had not noticed the change. It was held to be a fair question for the jury, upon the evidence in that case, whether, considering the nature of plaintiff's duties and occupation in the mill in respect to the location of the machinery in question, the change might not have escaped his observation without negligence on his part.

In *Sherman v. Chicago etc. R'y Co., supra*, the evidence tended to show that the space between the main and guard rail in a railway tract, usually designated as "the frog," was dangerous to employees engaged in coupling cars, etc., and that in the yard where plaintiff's intestate had been accustomed to work, and some time before he was killed, the defendant had adopted the device of inserting wooden blocks in the angle made by the rails to prevent accidents from the danger referred to. Subsequently some of these blocks were displaced, but it was held to be for the jury whether the instances were sufficiently numerous to indicate a change of rule by the company in respect to such protection; and the charge of the court, which limited the evidence of negligence of the deceased to the condition of the particular "frog" in which his foot was caught, and his knowledge thereof, was sustained; and the defendant's request—"that if the deceased knew that some of the rails were not blocked, and did not complain, but remained in the employ of the railroad company, although he did not know, when he went in to uncouple the cars, whether that particular rail in question was blocked or not, plaintiff cannot recover"—was held rightly refused. Nor was it to be assumed, under the circumstances, as matter of law, that because the condition of the frog in question was open to view that the deceased, in the exercise of reasonable diligence, ought to have known the danger, and hence should be deemed to have assumed the risk.

In the case at bar, the evidence tended to show that the plaintiff went to work for the defendants in their flour-mill early in July, 1881; that he had charge of the "break-roll machines," so called, twenty-two in number, which were run by "belting," and not by "gearing." On the same floor of the mill, and separated by a gangway twelve feet wide, were situated twenty-eight "smooth-roll machines," in a space by themselves, and under the charge of another employee. These last machines or mills were each run in part by "gearing." From

six to seven o'clock each morning, except Sundays, during the absence of the other miller, the plaintiff was in charge of the entire floor. As to the smooth-rolls, his principal duty seems to have been to relieve the conveyors when choked or clogged so that the grain from above failed to reach the hopper evenly, as occasion might require. He continued in the employment of the defendants until the latter part of August, when the mill shut down, and he was notified by the foreman to return to his place when the mill started up again, which he accordingly did, on the 16th or 17th of September following. During all his previous term of service, the gearing or cog-wheels had been protected with tin covers sufficient to prevent accident to employees working around the mills. Unless covered, the machinery, as the evidence tended to prove, was dangerous, but, as before shown, not such as to occasion liability to the mill-owners where the employees had been advised of the risk, so as to be responsible for the exercise of reasonable care in avoiding it, and there had been no negligence in that behalf on the part of the master. It further appears that while the mill was shut down the covers were removed from the gearing for the purpose of repairs, and that they had not all been replaced when the plaintiff returned to work, nor before he was injured; and that the plaintiff had no knowledge that they had been removed, or that any of the machines were not so protected, up to the time he was injured. How many or which of the smooth-rollers were then furnished with such covers does not appear, and no notice was given him in the premises. The smooth-roller mills were ranged close together, or about thirty inches apart, in rows four to six feet apart, and were placed on platforms connected by planks ten inches wide for the workmen to walk on. They were driven both by belts and gearing at each end, the gearing being composed of cast-iron cog-wheels, seven to ten inches in diameter, running into each other, and moving very swiftly.

In the morning of the fifth or sixth day after plaintiff's return to work, while left alone in charge of that flour of the mill, he was notified by the "bolter," who was engaged in another part of the mill, that some of the conveyors were clogged or choked, and immediately proceeded to ascertain the location of the difficulty, and passed among the smooth-roll machines till he came to No. 10, when, on lifting the cover of the hopper, and discovering that the grain was not moving, he struck one side of it with a mallet, standing on the platform

or plank, and then, turning to strike the other side of the hopper, he made a misstep or slip from the plank, and his hand was caught in the gearing on one end of the machine, which proved not to be covered, and was injured as alleged. There was one smooth-roller between No. 10 and the break-rolls, among which plaintiff ordinarily worked, and which were not raised on platforms. In certain positions, the machine No. 10 in question could be observed from that part of the mill, and others not, and in some positions the uncovered wheels were in plain sight, but in others were obscured by other machines or spouts or elevators.

We are quite clear that, upon the facts as shown by the evidence in plaintiff's behalf, the question whether he did in fact observe the exposed condition of the particular machine in question, or, in the exercise of reasonable care and diligence, ought to have known it, so that he should be held to have assumed the risk, was for the jury. Here are many things to be considered, and prominent among them is the fact that, when plaintiff returned to work, he understood the rule to be that the gearing of all the machines was covered, and he was never notified of any change. And in respect to No. 10, which was one out of nearly thirty machines of the same kind, part of which were covered in that part of the mill, and one of fifty to be looked after as occasion might require, it is to be remembered that there were many matters requiring his attention, a great deal of machinery in the mill, and a considerable connected with each machine. He had charge of the grinding, and it was not his duty to look after the repairs, or to keep the machinery in order. Leaving out Sunday and the day he commenced, he had only been in charge three or four mornings. And the character of his duties might reasonably be such as to distract his attention from the condition of the gearing on any particular machine, particularly if he was required to act promptly to prevent the conveyors from becoming "choked up." The evidence of plaintiff's negligence, therefore, in not observing and avoiding the danger, is certainly not conclusive. The determination of the question depended on numerous facts and circumstances, which are to be considered and weighed together in their relation to the issues involved in the case and to each other. In such cases, the general rule is, that the questions of fact must be submitted to the jury: *Massoth v. Delaware etc. Canal Co.*, 64 N. Y. 524; *Railroad Co. v. Stout*, 17 Wall. 657, 664, 665, and cases.

Order affirmed.

WHEN SERVANT ASSUMES RISKS OF DEFECTS IN MACHINERY OR APPLIANCES: See *Fisk v. C. P. R. R.*, *ante*, p. 22; and *Clapp v. Minneapolis etc. R'y Co.*, *ante*, p. 629, and note where the cases in the American Reports and American Decisions on this subject are collected.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY: See *Burns v. Chicago, M. & St. P. R'y Co.*, 58 Am. Rep. 227, note 229; *Central R. R. Co. v. Crosby*, Id. 463; *Conner v. Citizen St. R'y Co.*, 55 Id. 177; *Cincinnati I. & C. R'y Co. v. Gaines*, 54 Id. 334; *Vicksburg & M. R. R. Co. v. McGowan*, 52 Id. 205, note 208; *Stoner v. Pennsylvania Co.*, 49 Id. 754; *Louisville C. & L. R. R. Co. v. Goetz*, 42 Id. 227; *Cassidy v. Angell*, 34 Id. 690, note 691; *Cleveland C. & C. R. R. Co. v. Crawford*, 15 Id. 633; *Johnson v. Bruner*, 100 Am. Dec. 613, note 618, where other cases in that series are collected; *Detroit & M. R. R. Co. v. Curtis*, 99 Id. 141, note 144, collecting cases in that series.

BOLINGER v. ST. PAUL AND DULUTH R. R. Co.

[36 MINNESOTA, 418.]

EVIDENCE IS SUFFICIENT TO SUSTAIN FINDING OF NEGLIGENCE ON PART OF RAILROAD COMPANY which tends to show that at the time of the accident by which plaintiff's intestate, while crossing a street in a sleigh, was run into and killed, a train composed of box-cars was running backwards at a higher rate of speed than allowed by the city ordinance; that it was after dark in the evening; that the street was in use as one of the thoroughfares of the city; that there was at the time no watchman or flag-man at the crossing; and that the driver of the sleigh saw or heard no signal, and had no notice of the approach of the train in time to escape.

IT IS FOR JURY TO DETERMINE WHETHER SPEED OF RAILWAY TRAIN WAS REASONABLE, and the management thereof otherwise reasonably prudent, at a street-crossing in a city, when the situation at the crossing, the manner of running the train, the number and duties of the employees in charge, the rate of speed, the extent of travel on the street, and the opportunity for observation, are shown.

WHETHER PRESENCE OF WATCHMAN OR OTHER PRECAUTIONS NOT TAKEN WERE NECESSARY for the safety of the public is a question to be determined by the jury, in case of a railway accident occurring at a crossing on a public thoroughfare in a city.

WHERE EVIDENCE IS OFFERED TO SHOW THAT PRECAUTIONS WERE TAKEN BY DECEASED and those with him, at the time of the happening of a railway accident at a public crossing in a city, it is for the jury to determine whether or not such precautions were reasonably sufficient.

VERDICT OF FIVE THOUSAND DOLLARS FOR KILLING HEAD OF FAMILY, a strong, healthy man, in middle life, accustomed to earn good wages, who left a wife and children surviving him, will not be set aside as excessive.

ACTION for damages. The defendant appealed from an order denying a new trial.

James Smith, Jr., J. J. Egan, and I. V. D. Heard, for the appellant.

John D. O'Brien and Otto Kueffner, for the respondent.

By Court, VANDERBURGH, J. The deceased was fatally injured on the evening of Christmas, 1884, by defendant's cars, which came in collision with the sleigh in which he was riding, at the place where the tracks of the company cross Third Street, in the city of St. Paul. The accident is alleged to have been caused by the negligence of defendant, particularly in running its cars at a dangerous rate of speed, and in failing to give any proper signal or warning of their approach at the crossing. The evidence tended to show that the cars in question were box-cars, which were being backed or pushed across the street at the time; that they were running at a higher rate of speed than allowed by the city ordinance; that it was after dark, being past six o'clock in the evening; that the street was in use as one of the thoroughfares of the city; that there was then no watchman or flag-man at the crossing; and that the driver of the vehicle saw or heard no signal, and had no notice of the approach of the cars in time to escape.

The evidence was undoubtedly sufficient to sustain a finding of negligence on defendant's part by the jury. When the situation at the crossing, and the manner of running the train, the number and duties of the employees in charge, the rate of speed, the extent of travel upon the street, and the opportunity for observation, were shown, it was peculiarly for the jury to determine whether the rate of speed was reasonable, and the defendant's management of the train otherwise reasonably prudent: *Howard v. St. Paul, M., & M. R'y Co.*, 32 Minn. 214; 20 N. W. Rep. 93.

It was also for the jury to determine whether a flag-man or other precautions not used were necessary for the safety of travelers at the particular time and place, and how far any negligence which might rightfully be imputed to the defendant, in any of the particulars we have mentioned, was the efficient cause of the accident: *Shaber v. St. Paul, M., & M. R'y Co.*, 28 Minn. 103, 107, 108; 9 N. W. Rep. 575; *Kelly v. St. Paul, M., & M. R'y Co.*, 29 Minn. 1; 11 N. W. Rep. 67.

2. It is not so clear upon the evidence that there may not have been contributory negligence on the part of the driver of the sleigh; but the testimony in plaintiff's behalf presented a case for the jury. The jury would consider to what extent

the position of the freight-house, or cars standing on the street, as shown by some of the testimony, obscured the vision of the parties in the sleigh as they were approaching the track, in connection with other facts above referred to, and also the evidence of the driver, and those with him, that they looked and listened for the cars, and that he caused the horse to walk slowly for this purpose when he came near the crossing, and that they heard or saw nothing to warn them of danger until too late to retreat. It was for the jury to say, if they believed the witnesses, whether these precautions on the part of the deceased were, under the circumstances, reasonably sufficient: *Faber v. St. Paul, M., & M. R'y Co.*, 29 Minn. 465; 13 N. W. Rep. 902; *Kelly v. St. Paul, M., & M. R'y Co.*, *supra*.

3. The jury gave round damages, but the trial judge, on the motion for a new trial, has found no cause to interfere with the verdict on this ground, and we do not think this court warranted in declaring them excessive under the evidence in the case. The deceased was a strong, healthy man, forty-eight years of age, who earned good wages as a day-laborer. He left a wife and three children, two of whom were under the age of twenty-one years. The statute authorizes an action for damages for the benefit of the widow and next of kin. The jury in such cases may consider prospective advantages of a pecuniary nature which have been cut off by the premature death (in this case) of the husband and father. The value of the services of the head of a family in a pecuniary sense cannot be limited to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well, and the jury must judge of the circumstances of each case. In such cases damages for mere loss of society or mental sufferings are not to be included. The damages are to be calculated upon a reasonable expectation of pecuniary benefit, of right or otherwise, from the continuance of the life: *Shaber v. St. Paul, M., & M. R'y Co.*, *supra*.

"At the best," as remarked by Allen, J., in *Green v. Hudson River R. R. Co.*, 32 Barb. 25, 32, "the measure of damages must be somewhat indefinite, and much must be left to the good judgment of the jury."

The statute is to be construed as a remedial one, and must have a liberal interpretation to effectuate the evident purpose of its enactment. The determination of the amount of dam-

ages, however, must be a judicial one, and is not left to the uncontrolled discretion of the jury; and verdicts have not infrequently been set aside or reduced in this class of cases; but very rarely, we think, in a case like this, where the deceased is the head of a family, in middle life, apparently able to care and provide for them, and in various ways render them valuable assistance and service: *Carey v. Berkshire R. R. Co.*, 1 Cush. 475; 48 Am. Dec. 616, 641; 3 Sutherland on Damages, 282, 283; *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252.

Order affirmed.

RUNNING TRAIN AT UNLAWFUL RATE OF SPEED AS EVIDENCE OF NEGLIGENCE: See *Vicksburg & M. R. R. Co. v. McGowan*, 52 Am. Rep. 205; *Correll v. B. C. R. & M. R. R. Co.*, 18 Id. 22.

DUTY TO GIVE WARNING SIGNALS AT RAILWAY CROSSING: See *Ransom v. Chicago, St. P., M., & O. R'y Co.*, 51 Am. Rep. 718; *Pennsylvania Co. v. Hensil*, 36 Id. 188; *St. Louis, J., & C. R. R. Co. v. Terhune*, 99 Am. Dec. 504, note 506, where other cases in that series are collected; *O'Mara v. Hudson R. R. R. Co.*, 98 Id. 61, note 64, collecting other cases.

FLAG-MAN, WHEN RAILROAD COMPANY BOUND TO KEEP AT CROSSING: See *Houghkirk v. President etc. Delaware etc. Co.*, 44 Am. Rep. 370; *Hart v. Chicago, R. I., & P. R. R. Co.*, 41 Id. 93; *Pittsburgh, C., & St. L. R'y Co. v. Yundt*, 41 Id. 590; *Welsch v. Hannibal & St. J. R. R. Co.*, 37 Id. 440, note 443; *McGrath v. New York C. & H. R. R. R. Co.*, 17 Id. 359, note 363, collecting other cases; *Pennsylvania R. R. Co. v. Barnett*, 98 Am. Dec. 346, note 350, where other cases in that series are collected.

EXCESSIVE DAMAGES: See *Schmidt v. Milwaukee & St. P. R'y Co.*, 99 Am. Dec. 158, note 164, where other cases in that series are collected.

JACKSON AND WIFE v. HOLBROOK.

[26 MINNESOTA, 494.]

IN MINNESOTA, HOLDER OF JUNIOR JUDGMENT LIEN ACQUIRES NO PREFERENCE OVER SENIOR JUDGMENT LIEN by virtue of prior proceedings to execute his judgment, the senior judgment creditor not being a party to such proceedings. Nor is a different rule applied where the judgment debtor has made fraudulent conveyances, which are void alike as respects both. The judgments, in such cases, are liens at law, and as to real estate necessarily take precedence according to the date of the record.

JUDGMENT CREDITOR MAY REST EXCLUSIVELY UPON HIS RIGHTS AND REMEDIES AT LAW, without invoking the aid of a court of equity.

SALE UPON JUNIOR JUDGMENT IS SUBJECT TO ALL SUCH PRIOR JUDGMENTS as are in fact liens upon the land sold, and the purchaser at such sale takes subject to the lien of a senior judgment.

FACT THAT CONVEYANCE, UNDER WHICH TITLE APPEARS TO BE IN THIRD PERSON, IS FRAUDULENT, and of no effect, may be established by a suit in equity, or it may be proved in an action at law by any competent evidence.

ACTION AT LAW BY EXECUTION PURCHASER TO TEST VALIDITY OF HIS TITLE IS NOT NECESSARILY BARRED because the judgment creditor has lost his equitable remedy to set aside the fraudulent conveyance by lapse of time.

ACTION for breach of covenants against encumbrances in two warranty deeds from the defendant to the plaintiffs. In November, 1873, one Mendenhall, being the owner of the premises conveyed by said deeds, conveyed them to one Crump. Afterwards Mendenhall procured from Crump a power of attorney to sell and convey the property, and in October, 1874, he conveyed it, as such attorney, to Welles and Lowry. This conveyance was alleged to have been made to defraud creditors. In January, 1874, two judgments were docketed against Mendenhall, one in favor of one Gray, and the other in favor of Van Valkenburg & Co. In August, 1876, execution issued on the latter judgment, under which, in September, 1876, the lots were sold to one Smith, whose certificate was recorded in January, 1879. No redemption was made from this sale, and in August, 1881, Smith conveyed all his right, title, and interest to one Wilson. In 1875, seven judgments were docketed against Mendenhall. In February, 1876, the judgment creditors in these seven judgments brought suit against Mendenhall, Crump, Welles, and Lowry, to have the deed from Mendenhall and that from Crump set aside as fraudulent as to them. A decree was entered in this suit declaring the deeds void as against the plaintiffs' judgments. Executions were then issued on these judgments, under which the lots were sold in July, 1877. The lots were sold to Wilson, and no redemption was made from this sale. In June, 1878, and in September, 1881, Wilson conveyed the lots by quitclaim deeds to the defendant. Afterwards, in September, 1881, and in April, 1882, the defendant executed to the plaintiffs the deeds containing the covenants in question. In October, 1883, execution issued on the Gray judgment; under which, in December, 1883, the lots were sold to one Whitney. In December, 1884, in order to protect their title, the plaintiffs redeemed from this sale, paying \$1,002.80, the amount required to effect a redemption, which, with the interest thereon, the plaintiffs seek to recover. At the trial, the plaintiffs proved the sale under the Gray judgment; also the proceedings in the suit in which Mendenhall's and Crump's deeds were adjudged void as to the judgment creditors, who were plaintiffs in that suit, and the sale to Wilson, made in July, 1877. The plaintiffs then called Mendenhall as a witness, and asked him whether, at the time he

conveyed to Crump, he owed the debt on which the latter, in January, 1874, recovered his judgment. This was ruled out by the court. The plaintiffs then offered to prove by the witness that in November, 1873, when he conveyed to Crump, he was insolvent, and was indebted to Gray in the amount for which the latter recovered his judgment; and that the deeds to and from Crump were without consideration, and for the purpose of hindering and defrauding Gray and other creditors of Mendenhall. This evidence was excluded as incompetent, irrelevant, and immaterial. The plaintiffs then offered to prove that Wilson's purchase at the sale, in August, 1877, was made at defendant's request, and for her benefit. This also was excluded on the same objection. The court dismissed the action, on defendant's motion, and the plaintiffs appealed from an order denying them a new trial.

Torrance and Fletcher, for the appellants.

Woods, Hahn, and Kingman, for the respondent.

By Court, VANDERBURGH, J. Under the statutes of this state, the holder of a junior judgment lien acquires no preference over a senior judgment lien upon the same real estate, by virtue of prior proceedings to execute his judgment; and, as to all persons claiming under a judgment debtor subsequent to the lien of the senior judgment creditor, the rights of the latter are superior, and cannot be divested by any proceedings of a junior lien-holder, claiming under the same debtor, to which the senior creditor is not a party. The whole policy of the statutes in respect to the preferences of prior judgment liens against real estate would be subverted, if a junior judgment creditor could acquire a preference merely by virtue of superior diligence in taking proceedings to enforce his lien; nor do we understand that the law recognizes any different rule, as between judgment creditors, where the judgment debtor has made prior fraudulent conveyances which are void alike as respects both. The judgments in such cases are liens at law, and, as to real estate, necessarily take precedence according to the date of the record: *Wadsworth v. Schisselbauer*, 32 Minn. 84; 19 N. W. Rep. 390.

The judgment creditor may rest exclusively upon his rights and remedies at law, without invoking the aid of a court of equity: *Tupper v. Thompson*, 26 Minn. 385; 4 N. W. Rep. 621; *Campbell v. Jones*, 25 Minn. 155; *Kumler v. Ferguson*,

22 Id. 117. The procedure in this class of cases is very clearly and satisfactorily discussed by Comstock, J., in *Chautauque County Bank v. Risley*, 19 N. Y. 369, 375, who says, after considering the equitable remedy as between creditors: "But no creditor having a statutory lien by judgment can be compelled to take the equitable remedy. He may, if he prefer, stand upon his lien, and the means which the law has given him of enforcing it. If his debtor has made a prior fraudulent conveyance, he may nevertheless sell upon his execution, and the purchaser will have the right, and will take the risk, of impeaching such conveyance. If his judgment has been recovered before other creditors have instituted proceedings in equity, nothing in the course or in the result of those proceedings can affect his rights. A *lis pendens* filed with the bill or actual notice of the suit may, perhaps, subject all judgments afterwards recovered to any decree which shall be made, and render them subordinate to a receiver's sale": 75 Am. Dec. 347, 360, and note; and see *White's Bank v. Farthing*, 101 N. Y. 344; 4 N. E. Rep. 734; *O'Brien v. Browning*, 49 How. Pr. 109; *Morss v. Purvis*, 5 Thomp. & C. 140, 141, note; *Shand v. Hanley*, 71 N. Y. 319, 324; *Bergen v. Snedeker*, 8 Abb. N. C. 50, 58; *Union Nat. Bank v. Warner*, 12 Hun, 306; *Bergen v. Carman*, 79 N. Y. 146, 153.

A judgment creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditor's bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the land sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and applied: *Erickson v. Quinn*, 15 Abb. Pr., N. S., 166.

In the first two classes, the creditor enforces his judgment at law, and the sale upon execution must necessarily be subject to prior statutory liens. The purchaser in such cases succeeds to such title only as the debtor had, treating the debtor's fraudulent transfer as void: Freeman on Executions,

sec. 447. As to cases falling within the second class, the object of the equitable suit is to make the legal remedy more effective. In such case, no trust is created in respect to the property, but the creditor falls back upon his legal remedy, and instead of bringing his equitable suit before the sale, he may, if necessary, maintain it after sale in the form of an action to remove a cloud from his title: *Erickson v. Quinn, supra*. And where assets are applied by the court in creditors' suits as respects real estate, the rule is, as in other cases, to prefer prior liens in the distribution. "When the law gives priority, equity will not destroy it; and especially where legal assets are created by statute (as the judgment lien was here), they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery": Kent, C. J., in *Codwise v. Gelston*, 10 Johns. 507, 522; *Scouton v. Bender*, 3 How. Pr. 185; *Wiswall v. Sampson*, 14 How. 52, 67.

In some states, by statute, while all judgments are liens upon the realty of the debtor, yet the creditor who first takes proceedings to execute his judgment thereby secures the priority: *Dunham v. Cox*, 64 Am. Dec. 460; 10 N. J. Eq. 437, 466; Nixon's N. J. Dig. 724; and the same rule prevails in Alabama and several other states. •

In *Lyon v. Robbins*, 46 Ill. 276, the court treat the interest of the judgment debtor in the land, after the fraudulent conveyance, as a mere equitable one, and deny that in such cases judgments become liens on the land in the order of their rendition. The same rule is recognized in *Bridgman v. McKisick*, 15 Iowa, 260, under a statute of that state. This is not, however, the general rule, nor the rule in this state, where the lien of the judgment creditor is recognized and treated as valid, and one which may be enforced at law notwithstanding the prior fraudulent conveyance.

The defendant acquired title under an execution sale of certain real estate, which she afterwards conveyed to the plaintiffs by deed of warranty, with covenants against encumbrances. Subsequently the same land was sold upon execution issued upon a judgment rendered and docketed against the same judgment debtor, and prior to the one under which the defendant acquired title, and the plaintiffs allege that they were obliged, in order to preserve the title to the premises, to redeem the same by paying the amount for which they were so sold. The judgments under which the defendant de-

rived title were rendered in and subsequent to the month of August, 1875, and the judgments upon which the subsequent sale was made were recovered in the years 1874 and 1875, prior to the first-mentioned date. The first execution sale took place in August, 1877, and the second on the twenty-second day of December, 1883, and the redemption referred to was made December 22, 1884. A prior conveyance of the premises, fraudulent as to creditors, was made by the debtor in the year 1873. Prior to the first execution sale, the judgment creditors first mentioned brought an action in equity to set aside such conveyance as an obstruction to the enforcement of their liens, and a judgment was duly rendered therein, declaring such conveyance fraudulent and void, and setting it aside as to such judgment creditors, and thereupon the execution sale upon their judgments was had as above stated.

It necessarily results, from the propositions previously laid down in this opinion, that, if the prior judgments were valid liens, the rights of purchasers at the execution sale thereon were not and could not be subordinated to the rights of purchasers under the latter judgments. Neither party claims under the fraudulent grantee, but both claim in opposition thereto. As to every one except *bona fide* purchasers claiming under a conveyance from the debtor made prior to their judgments, they had fully complied with all the legal requirements necessary to preserve and enforce their rights at law when the judgments were duly recorded, and a sale made within the statutory time; and they were entitled to establish the existence of their lien by evidence of the fraud in an action at law as well as in equity: *Campbell v. Jones, supra*. It is clear, we think, that in this case the junior creditors acquired no priority merely by virtue of their equitable action and execution sale. Whether, if the proceedings had fallen within the third class above mentioned, and the sale had been made by a receiver, and the senior creditors had not been brought in, the rule would have been otherwise, we need not determine, though it is held in *Chautauque County Bank v. Risley, supra*, that it would not; and the soundness of the conclusion in that case, that a statutory lien upon real estate cannot be divested by the court in proceedings to which the holder is not a party, can hardly be questioned: *Derby v. Yale*, 13 Hun, 273, 278; *White's Bank v. Farthing*, 101 N. Y. 344; 4 N. E. Rep. 734.

The safer practice in equity, however, in that class of cases,

is, for all the judgment creditors to unite in the action, or it may be brought in behalf of plaintiffs and all other creditors, or such as consent to come in and be bound by the decree: *Hammond v. Hudson etc. Machine Co.*, 20 Barb. 378; 5 Wait's Practice, 644; 2 Van Santvoord's Equity Practice, 134; *Scouton v. Benders*, *supra*.

In *Wiswall v. Sampson*, *supra*, it was held that, where a court of equity laid hold of the property through the appointment of a receiver, a trust was thereby created for the benefit of the creditors, to be paid in the order of their priority, and that all lien-holders were obliged to come into that court, and seek their remedy there; yet that it was the duty of the court, in a suit by a junior judgment creditor, to take care that the prior liens and encumbrances should be provided for, and to adopt proper measures, by reference to a master or otherwise, to ascertain them. In that case the record of the prior liens, as well as that of the plaintiff in the suit, had been anticipated by a fraudulent conveyance, and the court held that a sale upon execution by the prior judgment creditors, pending the equity suit, was a contempt of court, and it accordingly refused to recognize the rights acquired thereunder. It was not questioned, however, that they might have been valid liens, entitled to priority: *Chautauque County Bank v. Risley*, *supra*; *Derby v. Yale*, *supra*; *White's Bank v. Farthing*, *supra*; *Rogers v. Ivers*, 23 Hun, 424.

Doubtless some confusion in the authorities has arisen from a failure to observe the distinction between creditors' bills proper, filed to reach equitable assets, upon which no liens exist till suit brought, and actions to set aside fraudulent conveyances of real estate, where there may be valid statutory liens, unaffected by a prior void conveyance. As before intimated, the purchaser at the first execution sale acquired only the rights of the debtor at the time of the docketing of the judgments (assuming the debtor's conveyance to be fraudulent), and *caveat emptor* would apply to such purchaser and his grantees, as respects the rights of prior lien-holders whose judgments have been duly rendered and docketed against the same debtor: *Frost v. Yonkers Savings Bank*, 70 N. Y. 553, 560; *Benedict v. Jones*, 18 Hun, 527; *Stafford v. Williams*, 12 Barb. 240; Freeman on Executions, sec. 447; 6 Wait's Actions and Defenses, 746, and cases; *Barron v. Mullin*, 21 Minn. 374; *Johnson v. Robinson*, 20 Id. 153 (189, 193); *Butman v. James*, 34 Id. 547; 27 N. W. Rep. 66.

The case is not within the registration laws. The sale upon a junior judgment is necessarily subject to all such prior judgments as are in fact liens at law upon the land sold, and the purchaser labors under the disadvantage of uncertainty as to the existence, nature, and amount of such liens, unless particularly ascertained before the sale. The fact that a conveyance under which the title appears to be in a third person is fraudulent, and of no effect, may be established by a suit in equity, or it may be proved in an action at law by any competent evidence: *Campbell v. Jones* and *Tupper v. Thompson, supra*.

If, therefore, the purchaser under the second sale in question had brought ejectment against this defendant, being in possession claiming under the first sale, he would have been entitled to recover if he belongs to the class of creditors against whom the transfer was void, which might have been shown by evidence similar to that offered in the trial court in this case. If the debtor or his grantee had redeemed from the first sale, then the senior judgment creditor would have been compelled to proceed against them; but, in the absence of such redemption, the rights of the debtor and his grantee were wholly divested, and they were no longer necessary parties in a suit involving the question whether defendant held the title subject to or clear of the alleged prior lien of the senior judgment: *Campbell v. Jones, supra*. If, then, the purchaser under the senior judgment might maintain ejectment against this defendant, it is clear that the judgment was an encumbrance which constituted a breach of defendant's covenant in her deed to the plaintiffs, and we think this action will lie. In *Chautauque County Bank v. Risley, supra*, the action was held well brought by the assignee of the purchaser under an execution sale against a purchaser under a receiver's sale in a creditor's suit; and the judgments are at least *prima facie* evidence of the relation of debtor and creditor and the amount of the indebtedness, and this evidence may be supplemented by evidence *aliunde*, showing that the cause of action existed at the time of the fraudulent transfer: *Vogt v. Ticknor*, 48 N. H. 242, 247, and cases; *Candee v. Lord*, 2 N. Y. 269, 275; 51 Am. Dec. 294; *Hersey v. Benedict*, 15 Hun, 282; *Goodnow v. Smith*, 97 Mass. 69.

We suppose the evidence should be substantially the same as was required under the chancery practice, upon an examination *pro interesse suo*, where a judgment creditor applies to be let in, and to share in the distribution of the assets of the

debtor: *Wiswall v. Sampson*, 14 How. 52, 65, 66, and cases cited; *Bergen v. Carman*, 79 N. Y. 146, 152.

We see no objection to the evidence offered on behalf of the plaintiffs, and think its rejection was error.

A judgment duly recorded is a lien, under our statute, on real estate for ten years, and may be enforced at any time within that period, subject to the rights of *bona fide* purchasers claiming under the debtor's grantee, of which the creditor would take the risk in case of delay. In this case, if any priority was acquired under the junior judgments, it was because they were first executed, and we are unable to see how the defendant was prejudiced by the subsequent delay of the senior creditors. She was bound to take notice of the fraudulent character of the judgment debtor's conveyance, as respects a certain class of creditors, and that the equity suit did not necessarily conclude creditors whose judgments against the same debtor had been previously recorded. It is true that the lapse of six years may have cut off the right of the purchaser at the last execution sale to bring an equitable suit, but under the decisions of this court the alleged fraudulent conveyance "might be treated as a nullity, and the property subjected to sale upon execution, at the instance of any judgment creditor, the same as though no transfer had been made": *Tupper v. Thompson*, *supra*. He might therefore rely wholly upon his remedy at law. But a cause of action at law, in ejectment or otherwise, would not accrue until the purchase at the execution sale, and, if it be conceded that the fraudulent character of the prior conveyance would be involved, the purchaser would be entitled to at least six years in which to assert his claim. Upon this question the court in *Hager v. Shindler*, 29 Cal. 48, 61, say: "It is no answer to say that the plaintiff, while yet a judgment creditor, might have sued in that capacity for the purpose of reaching the land as equitable assets. Such action would have differed from this both in *gravamen* and relief": See also *Stewart v. Thompson*, 32 Id. 260. If a party has a right to several actions, one is not necessarily barred because the others are: *Lamb v. Clark*, 5 Pick. 193, 198; *Ivey v. Owens*, 28 Ala. 641; Angell on Limitations, 6th ed., sec. 72.

Order reversed.

JUDGMENT LIENS, PRIORITY OF: See *Elston v. Castor*, 51 Am. Rep. 754; *Clonte v. Ritch*, 95 Am. Dec. 345, note 349, where other cases in that series are collected.

NATURE OF JUDGMENT LIENS, AND WHAT AFFECTED BY: See *Filley v. Duncan*, 93 Am. Dec. 337, note 345, where this subject is considered at length.

LINDSLEY v. CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

[26 MINNESOTA, 539.]

PERSON TRANSPORTING LIVE-STOCK ASSUMES WITH RESPECT TO IT COMMON-LAW RELATION of a common carrier with the incident duties and obligations, subject, however, to the modification that he is not an insurer, as respects injuries resulting without his fault from the inherent nature and propensities of the animals themselves.

BURDEN OF PROOF THAT CAUSE OF DEATH OF LIVE-STOCK IN COURSE OF TRANSPORTATION was within the exception qualifying his general liability is upon the carrier.

INSTRUCTION TO JURY THAT DEFENDANT MUST PROVE TO THEIR SATISFACTION, by a preponderance of the evidence, that death of live-stock in course of transportation resulted from some other cause than the defendant's negligence, means no more than that the defendant should establish that fact by what the jury should deem to be the weight of evidence. And there is no error in the form or terms of such instruction.

EXPERT WITNESS MAY BE ASKED WHAT COURSE CARRIER MIGHT PROPERLY PURSUE FOR RELIEF OF LIVE-STOCK suffering greatly from heat, while in transit in a railroad car.

ACTION to recover the value of twenty-four hogs, the property of the plaintiff, that died while being transported by the defendant, as a common carrier, owing to alleged negligence on the part of the defendant. The following instructions asked by the defendant were refused: "2. The jury are instructed that the fact that the hogs died in transit raises no presumption of negligence on the part of the defendant, or any of its employees, and that the burden of proof is on the plaintiff to show, by the preponderance of the evidence, that there was negligence on the part of the defendant, or of its employees, which directly caused the death of the hogs." "5. The jury are instructed that if, on the whole evidence, in your opinion, it is left in doubt what the cause of the damage was, then your verdict must be for the defendant. 6. The jury are instructed that if the evidence, in your opinion, leaves it in doubt as to whether there was any negligence on the part of the defendant or its employees, which directly caused or contributed to the death of the hogs, then your verdict must be for the defendant." The following instructions asked by the plaintiff were given: "2. In the transporting of the hogs in question the defendant was a common carrier, and as such was bound to use all care and precaution for their safety while in transit, so far as human vigilance and foresight and care would go. It was an insurer of the property, except in respect

to such injuries as may or might unavoidably result from the essential nature of the property itself, the nature and propensity of the hogs, and their capacity to inflict injury upon each other. 3. In this case, unless you find that these hogs died from some inherent want of vitality, or by reason of their inflicting injuries upon each other, or by inevitable accident, the defendant company is liable; and if it would escape liability, the burden of proof is upon it to show that the hogs died from some other cause than its negligence. In the absence of such proof, the law presumes negligence, and that such negligence caused the death of these hogs. In other words, the defendant, in order to escape liability in this action, must prove to your satisfaction, by a preponderance of the evidence, that the death of the hogs was the result of some other cause than its negligence, or the negligence of its employees or trainmen." The plaintiff had a verdict, and the defendant appealed from an order denying a new trial. Other facts are stated in the opinion.

H. H. Field, for the appellant.

T. J. Knox, for the respondent.

By Court, DICKINSON, J. 1. We will first consider whether there was error in the refusal of the court to instruct the jury as requested by the defendant, as to the burden of proof, and in the instruction given upon that subject. In brief, the question is whether, the hogs having died in transit, the burden was upon the plaintiff to show that the death was caused by the defendant's negligence, and not from disease, or from what might be termed natural causes, or was it upon the defendant to show that it was without negligence, so that it must be inferred that the death was from natural causes, for which the carrier was not responsible.

In this state, and generally in the United States, it has been held that a carrier engaged in the transportation of live-stock assumes, with respect to such property, the common-law relation of a common carrier, with the incident duties and obligations, subject, however, to the modification or exception that he is not an insurer, as respects injuries resulting without his fault, but from the inherent nature or propensities of the animals themselves: *Moulton v. St. Paul, M., & M. R'y Co.*, 31 Minn. 85; 47 Am. Rep. 781; 16 N. W. Rep. 497. In general, although the rule that the carrier is absolutely responsible as an insurer

of the property is subject to some exceptions, as in cases where the injury or loss is to be referred to the act of God or the violence of public enemies, yet the burden of proof, as respects the cause of loss or injury, is, even in such cases, upon the carrier, who, to exonerate himself from liability, must show that the cause of the loss was of the exceptional kind which the law recognizes as excusing him: *Shriver v. Sioux City etc. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 839; *Alden v. Pearson*, 3 Gray, 342; *Murphy v. Staton*, 8 Munf. 239; *Forward v. Pittard*, 1 Term Rep. 27, 88; Angell on Carriers, secs. 202, 472. From considerations of public policy (*Riley v. Horne*, 5 Bing. 217, 2 Starkie on Evidence, 7th Am. ed., 287), the mere fact of loss being shown, the law presumes negligence or misconduct on the part of the carrier, and the burden of proof is not upon the owner, although the loss appear to have been of such a nature that it might have been caused by the act of God, if it might as well have resulted from the negligence of the carrier.

Thus, in the case of goods shown to have been burned while being transported on a railway, the owner may unquestionably recover if nothing more be shown, although, for aught that appears, the fire may have been caused by lightning, and not from any human agency. In principle, this case is not different. To put the burden of proof upon the plaintiff would be inconsistent with the legal presumption of negligence or misconduct which is everywhere recognized, and which is in general of a conclusive character, excluding even proof of actual carefulness, except as the cause of the loss may be shown to have been within the legally defined exceptions to the rule of absolute liability. By force of this presumption, the carrier is charged with responsibility, unless in some way it be shown that the animals died from some cause not involving fault on the part of the carrier. This is not shown by the mere fact of the death of the animals; for, as in the case of loss by fire, this may as well have resulted from the misconduct of the carrier as from the act of God. The court was right in ruling that the burden of proof was upon the defendant.

We discover no error in the form or terms in which the instructions were presented. In saying to the jury that the defendant must prove to their satisfaction by a preponderance of the evidence that the death of the hogs resulted from some other cause than its own negligence, the court obviously meant

no more than that the defendant should establish that fact by what the jury should deem to be the weight of the evidence. This is apparent from the language employed, especially in connection with the instruction given upon the defendant's fourth request.

The fifth and sixth requests of the defendant were properly refused. They were opposed to the correct theory upon which the case seems to have been committed to the jury (as is apparent from the instructions given upon the defendant's fourth and the plaintiff's third requests), that the burden was upon the carrier to show by the preponderance of the evidence that the death resulted from some inherent property in the animals without the contributory fault of the carrier.

The instruction given upon the plaintiff's second request was not unfavorable to the defendant, in view of the principle correctly embodied in it that the carrier is an insurer, except as respects injuries resulting from the nature of this kind of property.

2. The verdict was justified by the evidence. Without regard to the legal presumption arising from the destruction of the property, the evidence presents a case from which the jury might find negligence on the part of the carrier. This car-load of hogs was wholly in the care of the defendant, it not being customary to allow the shipper to accompany a single car-load of stock to care for it. There is no claim that the car was overloaded, and the evidence is that it was not. Apparently the hogs were in good condition when they left Lacrosse, on the morning of May 23d. At Portage, at about six o'clock that afternoon, twenty-four of them, or more than one third of the whole car-load, were found dead. At that place (Portage) the hogs then alive were removed from the car, and no more deaths occurred. This mortality was extraordinary, witnesses for the defendant of experience in such business never having known more than three or four deaths to occur in a single car-load. The animals were not in need of food. The day was very hot, and, as the defendant's evidence showed, the animals were showered with water (which seems to have been proper treatment) at three places in the course of the day, the last time at about three o'clock in the afternoon. Notwithstanding this, the conductor of the train observed that the hogs were panting as though too warm. At midday, at a point seventy-eight miles from Portage, he showered them because he smelled them in walking over the

train. He observed two dead hogs at a point forty-three miles from Portage, and at a point twenty-five miles from Portage that seven or eight were dead, and the remainder in bad condition. Other stations were passed before coming to Portage, where, as the evidence tended to show, the stock might have been left and unshipped. From this and other evidence tending to the same conclusion, the jury might well conclude that there was negligence in not setting the car off from the train, and unloading the stock, as was done at Portage, before the final destination was reached.

3. Error is assigned as to the overruling of an objection to a question put to the plaintiff in rebuttal as to what would have been the proper thing for the conductor to have done in caring for the hogs under the circumstances testified to by the conductor (defendant's witness). The plaintiff was qualified to testify if such evidence was admissible. It cannot be assumed that all the jurors had had such experience as would have enabled them to judge as well as the witness as to what course should have been pursued. The witness might have answered that they should have been showered oftener or longer, or he might have indicated some other course as proper, concerning which the jury may have been uninformed. In fact, the answer suggested a course which probably would have been in accordance with the ordinary judgment of men,—that is, setting the car off at a station, and unloading the animals. The question was unobjectionable, and if this answer was deemed to state what was within the province and general information of the jury, there should have been a motion to strike out.

Order affirmed.

BURDEN OF PROVING ABSENCE OF NEGLIGENCE IS ON COMMON CARRIER: See *Ryan v. M., K., & T. R'y Co.*, 57 Am. Rep. 589; *Chicago etc. R. R. Co. v. Moss*, 45 Id. 428; *Shriver v. Sioux City etc. R. R. Co.*, 31 Id. 353; *Shenk v. Philadelphia S. P. Co.*, 100 Am. Dec. 541; *Chapman v. New Orleans etc. R. R. Co.*, 99 Id. 722, note 725, collecting cases in that series.

DUTY OF CARRIER OF LIVE-STOCK: See *East Tennessee V. & G. R. R. Co. v. Johnston*, 51 Am. Rep. 489; *Grey v. Mobile T. Co.*, 28 Id. 729.

LIABILITY OF CARRIERS OF LIVE-STOCK: See *Moulton v. St. Paul etc. R'y Co.*, 47 Am. Rep. 781; *Kansas City etc. R. R. Co. v. Simpson*, 46 Id. 104; *Georgia R. R. v. Beattie*, 42 Id. 75; *Georgia R. R. v. Speers*, 42 Id. 81; *Bamberg v. South Carolina R. R. Co.*, 30 Id. 13; *Mynard v. Syracuse etc. R. R. Co.*, 27 Id. 28, and note collecting prior cases in that series; *Pitre v. Offutt*, 99 Am. Dec. 749, note 751, where other cases in that series are collected.

PRATT v. DUNCAN.

[36 MINNESOTA, 545.]

MINNESOTA STATUTE DOES NOT AUTHORIZE MECHANIC'S LIEN FOR FILLING IN AND GRADING EARTH about buildings already erected, where the work does not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land.

ACTION to determine the defendant's claim to a lien on premises belonging to the plaintiffs. The plaintiffs had judgment, and the defendant appealed.

E. A. Campbell and J. E. Waters, for the appellant.

Merrick, Davenport, and Thian, for the respondents.

By Court, DICKINSON, J. The defendant's claim of a lien cannot be sustained. The right of lien is asserted for earth furnished and labor done in banking up the basement and foundation walls of buildings upon the premises sought to be charged, and in filling and grading the grounds for the purpose of sodding. This is not within the statute which authorizes a lien for labor performed or material furnished for the "erection, alteration, or repair of any house, mill, manufactory, or other building, or appurtenances": Gen. Stats. 1878, c. 90, sec. 2. Section 6 of this chapter, after prescribing the procedure by which a lien may be perfected, declares that the same shall operate as a lien "upon the several descriptions of structures and buildings, and the lots of ground on which they stand, in the second section of this chapter named." The statute is not to be construed as authorizing a lien for improvements or operations upon the soil merely, which do not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land, and which are wholly unconnected with the erection of or work upon such artificial structures: *Smith v. Kennedy*, 89 Ill. 485. The labor and material for which a lien is here claimed bore no disclosed relation to the construction, alteration, or repair of any structure upon the land, and the right to a lien was properly denied.

Judgment affirmed.

MECHANIC'S LIEN, FOR WHAT GIVEN: See *Smith Bridge Co. v. Bowman*, 52 Am. Rep. 67; *Brown v. Wyman*, 41 Id. 117; *Neilson v. Iowa E. R. R. Co.*, 33 Id. 124; *Stryker v. Cassidy*, 32 Id. 262, note 264; *Graham v. Mount Sterling Coalroad Co.*, 29 Id. 412; *Drew v. Mason*, 25 Id. 288; *Pennsylvania & D. R. R. Co. v. Leuffer*, 24 Id. 189; *Galbreath v. Davidson*, 99 Am. Dec. 233; *Hill v. Newman*, 80 Id. 473; *Derrickson v. Edwards*, 80 Id. 220; *Chapin v. Perse & B. P. Works*, 79 Id. 263, note 268; *Lacrosse & M. R. R. Co. v. Vanderpool*, 78 Id. 691, note 694, where this subject is fully considered.

ANDERSON v. PETERSON.

[36 MINNESOTA, 547.]

UNITED STATES PATENT ISSUED TO MINOR HEIRS of a father who had made a homestead entry upon land in Minnesota, and died leaving children under twenty-one years of age, passes the title to all of said children; although at the time of his death one of them, a daughter, was over the age of eighteen years, and therefore not a minor under the laws of Minnesota.

ACTION for partition. The plaintiffs claimed two thirds of the premises under deeds from Hannah M. and Hamilton McCollom, and the defendant claimed one half thereof under a deed from Henry McCollom. The court below found that the plaintiffs were entitled to two thirds and the defendant to one third, and entered judgment accordingly. The defendant appealed.

Daniel Rohrer, for the appellant.

L. M. Lange, for the respondents.

By Court, GILFILLAN, C. J. August 18, 1871, Hamilton McCollom made a homestead entry, under the law of the United States, on land situated in this state. He died March 10, 1876, leaving no widow, and leaving children under twenty-one years of age,—Hannah M., aged nineteen years and nine months; Hamilton, aged eighteen years; and Henry, aged fourteen years.

August 23, 1876, the administrator of the deceased made final proof upon the entry, and the usual final receiver's certificate was thereupon issued. At the time of making final proof, he filed in the land-office an affidavit stating that McCollom left no widow, and left two children, minors and heirs at law. The final certificate stated that the administrator had made full payment for the minor heirs of Hamilton McCollom, and that, on presentation of the certificate to the commissioner of the general land-office, "the said minor heirs of Hamilton McCollom, deceased, shall be entitled to a patent." A patent issued December 1, 1876, reciting that "there has been deposited in the general land-office of the United States a certificate of the register of the land-office at Worthington, Minnesota, whereby it appears that the claim of the minor heirs of Hamilton McCollom, deceased, by Lucian B. Bennett, administrator, has been established and duly consummated in accordance with law," and proceeds: "That there is there-

fore granted by the United States unto the said minor heirs of Hamilton McCollom, deceased, the tract of land above described."

The question raised on this patent is, Did the above-named three children take title, or did only Hamilton and Henry take, excluding Hannah? Who were the minor heirs, within the meaning of the patent? The defendant contends that this must be determined according to the law of this state defining "minority," and that, as by that law, Hannah was no longer a minor, she being then more than eighteen years of age, she does not come within the description of the grantees in the patent. The land-office did not assume to determine what particular individuals were entitled to the rights secured to the deceased, and so did not name any particular persons as grantees in the patent, but designated the grantees by a description. Was the law of Minnesota or the law of the United States in mind when that description was inserted? Undoubtedly the latter; for the officers of the department were acting under it, and must be supposed to have intended to carry out its provisions. Sections 2289-2291 of the Revised Statutes of the United States give the right to enter a homestead, and prescribe how it shall be secured, and when the right shall become perfect. Section 2292 has this provision: "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children."

At the common law, children of both sexes under twenty-one were infants or minors, and they were so by the law of Minnesota when section 2292 was passed. As there were persons exclusively entitled under section 2292, it must be presumed that, in issuing the patent, the land-office intended to grant to such persons. It is true, the description selected to designate them might be regarded as inaccurate, but, reading the patent with the section, there can be no doubt as to what class of persons was intended; that the persons described in the section, to wit, the children under twenty-one years of age, were intended.

Section 2292 contains also this clause, immediately following what we have quoted: "And the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the state in which such children for the time being have their domicile, sell the land for the benefit of such infants, but for

no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

It is suggested upon this, that the only benefit the infant children can get under the section is through a sale by the executor, administrator, or guardian. The clause, however, does not limit the preceding one. It is an addition to it. It is an enabling clause by which the executor, administrator, or guardian may (as against the United States) sell the children's right, as, according to the law of their domicile, he may sell other of their property. The right inures to the children at once upon the death of the parents, but it may be divested in the manner stated. If there is no such sale, their right becomes perfect, and they will become entitled to a patent.

Judgment affirmed.

DEED TO "HEIRS" VESTS TITLE IN WHOM: See *Fountain Co. O. & M. Co. v. Beckelmeier*, 52 Am. Rep. 645.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

EVANS v. ROBBERTSON.

[92 MISSOURI, 192.]

SHERIFF'S ADVERTISEMENT FOR SALE OF LANDS need only state the day on which the sale will take place; it need not state the hours of that day between which it will be sold, as the law fixes that.

PRESUMPTION WILL BE INDULGED THAT SHERIFF'S NOTICE OF SALE of land under execution was posted at the front door of the court-house, as required by law, when there is nothing to negative such presumption.

EVERY REASONABLE PRESUMPTION WILL BE INDULGED in favor of sustaining the ministerial acts of officers making judicial sales.

FAILURE OF SHERIFF TO POST NOTICE OF SALE of land under execution in front of the court-house, as required by law, is but an irregularity, which cannot affect the title of an innocent purchaser without notice, in a collateral proceeding, though it might be ground for setting aside the sale in a direct proceeding between the interested parties.

SHERIFF'S DEED REGULAR IN FORM and properly acknowledged is admissible in evidence in support of the recitals therein contained.

JUDGMENT, SALE, AND DEED OF LAND FOR TAXES, under the Missouri statutes of 1877, page 386, section 6, in order to bind the interests of the owner, must show that he was made a party, if known; and if not known and not made a party, then his interest can only be affected by making the party appearing by the record to be the owner a party to the suit.

Patterson, for the appellant.

Travers, for the respondent.

By Court, **BRACE, J.** This was an action in ejectment for the west one half of the northwest quarter of section 4, township 30, range 22, in Greene County, Missouri. The petition, in usual form, was filed April 14, 1883. The answer of the

defendant admitted possession, and denied the other allegations of the petition. The case was tried by the court without a jury; verdict and judgment for plaintiff. Both parties claim title under one Theophilus Leathers, who, it was admitted, was the owner of the land at the time of his death in 1857, and who, by will, devised said land to his wife, Elizabeth (who died January 24, 1883), during her life; remainder in fee to his sons, Edwin R. and John W. Leathers. Plaintiff claims to have acquired all the undivided interest of the said Edwin R. in the said northwest quarter of the southwest quarter, by virtue of a sheriff's deed dated June 5, 1873, properly acknowledged and recorded March 3, 1883, and the undivided interest of John W. in the west one half of said northwest quarter of the southwest quarter of the land sued for, by a verbal partition, between him and the said John, of said forty-acre tract; and on the trial offered said sheriff's deed in evidence, to which defendant objected, but which was admitted in evidence over his objection. The deed contained the following recitals:—

“Whereas, on the ninth day of May, 1872, judgment was rendered in the circuit court of Greene County in favor of Elisha Headlee, public administrator of Greene County, Missouri, having in charge the estate of Nathan Boone, deceased, and against E. R. Leathers, John Evans, and D. M. Evans, for the sum of \$200.29 for debt, and \$21.25 for damages, and also for costs in said suit, upon which judgment an execution was issued from the clerk's office of said court in favor of the said Elisha Headlee, public administrator as aforesaid, and having in charge the estate of said Nathan Boone, deceased, and against the said E. R. Leathers, John Evans, and D. M. Evans, dated the 11th of January, 1873, directed to the sheriff of Greene County, and the same was to me on said day delivered; by virtue of which execution I did, on the eleventh day of January, 1873, levy upon and seize all the right, title, interest, and estate of the said E. R. Leathers, John Evans, and D. M. Evans, of, in, and to the following described real estate, situate in said Greene County, to wit, the northwest quarter of the southwest quarter of section four (4), township thirty (30), range twenty-two (22); and whereas, in pursuance of law, and by virtue of authority in me vested by law as sheriff of said county, I caused said real estate to be advertised for at least twenty (20) days before the twenty-second day of February, 1873, giving the time and place of

sale and of the real estate to be sold, and where situate, as the law directs, by publication in the Springfield Leader, a newspaper printed and published in my said county of Greene, that I would, on the twenty-second day of February, 1873, that being the sixth day of the February term of said court, offer the above-described real estate for sale at public auction, at the court-house door in my said county, while said circuit court was in session, between the 'lawful hours' of said day, for cash in hand; and whereas, by an act of the legislature, approved January 18, 1873, the time of holding the said February term of said circuit court of Greene County, for the year 1873, was changed from the third Monday in February to the first Monday in May, 1873; and whereas, I did, on the first day of the said May term, 1873, of said circuit court, that being the first term of said court held in pursuance of the said change of time of holding the same, made by the act of the legislature aforesaid, put up a written notice that I would, by virtue of law and the said judgment and execution, on Saturday, the 10th of May, 1873, that being the sixth day of the said May term, and the said day of the term that said sale was advertised to take place at said previous February term, sell said real estate above described, and in said notice I specified the names of the parties to said execution, the list of the property sold, and stated the fact that said property had been previously advertised, giving the name of the paper and its date; and whereas, by virtue of authority in me vested, I did, on the tenth day of May, 1873, whilst the circuit court was in session, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day, expose to sale said real estate at public vendue to the highest bidder, at the court-house door of my said county, and at said sale D. M. Evans, being the highest and best bidder for said real estate," etc.

It is contended for the appellant that the recital in said deed, that the real estate was advertised to be sold between the "lawful hours" of the day upon which it was to be sold, renders it invalid. There is nothing in this contention. It was the duty of the sheriff to designate the day upon which the land would be sold in his advertisement; the law fixed the hours of that day between which it must be sold; and whilst it was not necessary that the hours should be stated in the advertisement, it was the duty of the sheriff to sell between those hours: 1 W. S., p. 610, sec. 45; and the recital in

the deed shows that the sheriff did sell the land between the hours of 9 A. M. and 5 P. M., as the law required.

It is next objected to said deed that it does not appear that the notice therein recited was put up "at the front door of the court-house." The law governing the case is as follows: "In all cases where the times of holding the terms of the several courts of this state shall be changed by the legislature, all sales of property which would have been made at the terms previously established by law shall be made at the first term of the court to be held in pursuance of such change, and where such sales have been advertised to be made on any day of such previously established term, to satisfy any execution returnable thereto, . . . the sale shall be made on the same day of the term held in pursuance of the change aforesaid, and no second advertisement of such sale shall be necessary, but it shall be the duty of the sheriff having in charge the execution aforesaid to put up at the front door of the court-house of the proper county, on or before the first day of the changed term, a list of the property to be sold, specifying the names of the parties, the property to be sold, and the day of sale, and stating the fact that said property has been previously advertised, giving the name of the paper and its date": Gen. Stats. 1865, p. 541, sec. 44.

It will be observed that the recitals in the deed show a compliance with the requirements of the law in every particular, except in that it does not thereby affirmatively appear that the notice was put up "at the front door of the court-house." There is nothing in the deed that tends to negative or is inconsistent with the idea that in fact the notice was put up at the front door of the court-house, and it is to be presumed that the officer in this respect discharged his duty. It is the policy of the law that every reasonable presumption should be indulged in favor of sustaining the ministerial acts of officers making judicial sales; besides, the advertisement designated the day of the February term on which the land would be sold; the law required that it should be sold on the same day of the next changed term. The act making the change fixed the day on which such term should commence, and everybody was informed by the advertisement and the law in such cases of the day on which alone the land could and would be sold at such changed term, and it was accordingly so sold; and even if the sheriff should have failed to put up the required notice at the front

door of the court-house, his failure to do so, at best, would have been an irregularity which, although it might have afforded grounds for setting aside the sale in a direct proceeding for that purpose by the parties interested, could not affect the title of an innocent purchaser without notice in a collateral proceeding: *Rorer on Judicial Sales*, 794; *Draper v. Bryson*, 17 Mo. 71; 57 Am. Dec. 257; *Wilhite v. Wilhite*, 53 Mo. 71; *Buchanan v. Tracy*, 45 Id. 437.

There was no error in admitting said sheriff's deed in evidence; its legal effect was to convey to plaintiff the undivided interest of Edwin R. Leathers in the northwest quarter of the southwest quarter of said section, and he thereby became a tenant in common in fee with John W. Leathers of said tract; and by virtue of the partition between him and the said John W., became the sole owner of the west half of said northwest quarter of the southwest quarter of section 4, the land sued for, and entitled to recover the same in this action, unless the defendant acquired plaintiff's title thereto by virtue of the tax deed by him offered in evidence.

The tax deed under which defendant claims was executed by the sheriff of Greene County, dated the fourteenth day of November, 1883, properly acknowledged, and is based on a judgment rendered on the twenty-fourth day of December, 1879, in the circuit court of Greene County, in favor of the state of Missouri at the relation of the collector of said county against Elizabeth Leathers, in an action to enforce the state's lien for delinquent taxes for the year 1877. The law in force at the time the suit by the collector was instituted, which resulted in the judgment against Elizabeth Leathers, required that "all actions commenced under its provisions shall be prosecuted in the name of the state of Missouri at the relation and to the use of the collector and against the owner of the property, . . . and all notices and process in suits under this act shall be sued out and served in the same manner as in civil actions in circuit courts; and in case of suits against non-resident, unknown parties, or other owners, on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property." In all suits under this act the general laws of the state as to practice and proceedings in civil cases shall apply, etc.: *Laws of 1877*, p. 386, sec. 6. In order to bind the interest of the owner of land by a judgment rendered in an action of this character, it is necessary that he should be made a

party to the proceeding, if known; and if not known and not made a party, then his interest in the land can only be affected by making the party appearing by the record to be the owner a party: *Vance v. Corrigan*, 78 Mo. 94; *State ex rel. Hunt v. Sack*, 79 Id. 661; *Gitchell v. Kreidler*, 84 Id. 473. In this case neither the plaintiff, who was at the time the owner in fee of the undivided half (by the unrecorded sheriff's deed aforesaid) of the land sued for, nor Edwin R. or John W. Leathers, who appeared of record to be the owners in fee of said land, and whose title the plaintiff has acquired, were made parties to the suit, and the judgment therein, and the sale and tax deed made in pursuance thereof, did not have the effect to pass such title to the defendant.

The instructions given for plaintiff contained correct declarations of the law applicable to the case, and there was no error in refusing those asked for the defendant. The judgment of the circuit court is affirmed.

NOTICE OF EXECUTION SALE, whether must state hour at which sale will take place: *Trustees v. Snell*, 68 Am. Dec. 586, and note; note to *Hoffman v. Anthony*, 75 Id. 707.

REGULARITY OF SHERIFF'S SALE IS PRESUMED: *Childs v. McChesney*, 89 Am. Dec. 545, and note 550. The same rule applies to all judicial sales: *Thomas v. Malcom*, 99 Id. 459, and note 461.

IRREGULARITY AND NOTICE OF SALE BY SHERIFF does not vitiate the sale as to a *bona fide* purchaser: *Minor v. President etc. of Natchez*, 43 Am. Dec. 488; *Howard v. North*, 51 Id. 769.

SHERIFF'S DEED AS EVIDENCE: *Hardin v. Cheek*, 64 Am. Dec. 600, and note 602.

MCGEE v. MISSOURI PACIFIC RAILWAY COMPANY.

[92 MISSOURI, 206.]

PASSENGER RIDING ON FREIGHT TRAIN, by direction and permission of the conductor, and without notice that his so riding is against the rules of the company, is entitled to the same rights as if he were riding on a passenger train.

IF PASSENGERS ARE HABITUALLY CARRIED ON RAILWAY COMPANY'S FREIGHT TRAINS, one who is received as a passenger on such train is entitled to the same degree of care as passengers on regular trains, except that in taking the freight train, accepting and traveling upon it, he acquiesces in the usual incidents and conduct of such train, managed by prudent and competent men.

WHEN IN ACTION AGAINST RAILROAD COMPANY for injuries received by one in alighting from a freight train, on which he was regularly received and traveling as a passenger, it appears that the train was not stopped

at the usual place, where it was safe for passengers to alight, but at an unusual place, where it was unsafe and dangerous, and where the regular station was announced, thereby inviting the party injured, nothing to the contrary appearing, to get off when and where it stopped, and the night was very dark, and passengers in the caboose could not, for that reason, see the danger, and the conductor, on leaving the caboose with the light, could or might have seen it, his failure to warn and inform the passengers of the danger was gross negligence, for which the company is liable.

SLOWING UP OF FREIGHT TRAIN carrying passengers, as it approached a regular station, the sounding of the whistle, the announcement by the brakeman of the station, stopping the train, the act of the conductor and brakeman leaving the caboose with the light, and the detachment of the engine to take water, can be construed only as a direction to the passengers to alight, then and there, and they, in absence of proof to the contrary, have the right to conclude that it is a safe place to alight, and if one receives injury in so doing, because the place is dangerous, the company is liable.

IN ACTION AGAINST RAILROAD COMPANY for injury received while traveling as a passenger on a freight train, evidence is admissible to prove that it was the custom and usage of the company to carry passengers on their freight trains.

EVIDENCE IS ADMISSIBLE TO PROVE that the station announced is the stopping-place for freight trains, in an action against a railroad company for injury received while traveling as a passenger on such train.

Adams and Bowles, and Portis, for the appellant.

Rodes and Waller, for the respondent.

By Court, NORTON, C. J. This is an action to recover damages for injuries sustained by plaintiff, a passenger on one of defendant's freight trains, in consequence of defendant's negligence; and the case is before us on defendant's appeal from a judgment obtained by plaintiff on the trial, and we are asked to reverse the judgment because of alleged error in the circuit court in refusing to give an instruction for defendant in the nature of a demurrer to the evidence, and in giving improper instructions for plaintiff.

The evidence on the part of the plaintiff tends to establish the following facts, viz.: That plaintiff purchased from defendant's ticket-agent at Paris, Missouri, a round-trip ticket for himself and wife, from Paris to Moberly, and return; that, having gone to Moberly, and wishing to return to Paris, he was directed by defendant's ticket-agent at Moberly, with the acquiescence of the conductor, to take passage on a freight train standing on defendant's track some distance from the depot; that the caboose having been pointed out, plaintiff and his wife, a Miss Carrer, and one Mason, entered the caboose at

tached to said train; that the conductor of said train took up the tickets from plaintiff for himself and wife, and collected from him one fare in cash for Miss Carrer; that it was dark when the train left Moberly, and very dark when the train arrived at Paris, about 9:30 o'clock at night,—so much so, according to the evidence of one of the witnesses, that you could not see your hand before you; that the train on approaching Paris was slowed up, and the whistle sounded; that the conductor and hind brakeman came down from the lookout on the caboose, and the brakeman, in the hearing of all the passengers, announced Paris, and with the conductor went out of the caboose, taking the light with them, the train in the mean time coming to a stop, and the conductor and brakeman proceeding down the track to the depot, when the conductor registered his train, during which time, and after the stop, the engine was detached from the train for the purpose of taking water at the tank. The evidence tended further to show that the train, instead of being stopped at what is known as Fox crossing, the usual stopping-place for north-bound freight trains, and which was known to plaintiff to be a safe place for alighting from trains, was stopped some distance before reaching said crossing, with the caboose standing on the east end of a high trestle put in a deep ravine, where heavy timbers had been dropped in against piling, making a square wall thirty or forty feet long and nine feet high, the bank being steep; from the rail to the edge of the embankment was about five feet, and the steps of the caboose extended about two feet from the rail, so that a person in stepping down from the caboose would step within a foot of the edge of the embankment.

The evidence tends further to show that after the train stopped, and after the action of the conductor and brakeman in leaving the caboose and going down to the depot, and the detachment of the engine from the train, that plaintiff and the other passengers alighted from the caboose, and that plaintiff, having alighted, in assisting one of the lady passengers to alight, fell over the embankment, receiving the injury for which he sues, consisting of a broken leg. The evidence, while it also tended to show that plaintiff had long been a resident of Paris, was acquainted and knew of the embankment by having passed over and seen it previous to the accident, did not tend to show that he knew the caboose had stopped there when he got off. The evidence also tended to

show that the freight train on which plaintiff took passage was an extra, which, under the rules of the company, was not permitted to carry passengers, but did not tend to show that plaintiff had knowledge thereof.

The above facts, which the evidence tended to establish, make out a case which it was proper to submit to the jury. Notwithstanding, under the rules of the company (which were unknown to plaintiff), passengers were not permitted to ride on the train in question, yet plaintiff, when directed by the agents of defendant, whose duty it was to direct passengers what trains they would enter, to take passage on this train, became a passenger: *Marshall v. Railroad*, 78 Mo. 610; *Logan v. Railroad*, 77 Id. 668; *Hicks v. Railroad*, 68 Id. 329; 2 Wood's Railway Law, sec. 355, p. 1413. At pages 1044 and 1045 of the author last cited, it is said: "A person, who without knowing it is against the rules of the company for passengers to ride on a freight train, if he pays his fare, and is received as a passenger by the conductor, he may be entitled to the rights of a passenger; and such, also, may be the case where, notwithstanding the rules, it is shown that passengers have been habitually carried upon such trains; but where a person, knowing the rules, gets upon a freight train, even with the assent of the conductor, and pays no fare, he cannot be regarded as a passenger."

In the case before us there was abundant evidence showing that passengers were habitually carried upon defendant's freight trains. Plaintiff having been received by defendant as a passenger on its freight train, the same degree of care was due to him that defendant owed to passengers on its regular trains, except that plaintiff, in taking the freight train, accepted and traveled on it, acquiescing in the usual incidents and conduct of a freight train managed by prudent and competent men: *Indianapolis etc. R. R. v. Horst*, 93 U. S. 291.

In section 20, page 234, Thompson on Carriers of Passengers, it is said: "The company is held to as strict an accountability for the negligence of its employees in the management of a train with a caboose attached in which passengers are seated, as the law imposes in the transportation of passengers on trains especially provided for that purpose. It cannot, however, be expected that a company will provide its freight trains with all the conveniences and safeguards against danger which may properly be demanded in the construction and operation of cars designed solely for the transportation of

passengers. . . . The ordinary rule that the company must provide safe and convenient means of getting on and off trains obviously has but slight application to the case of a passenger traveling on a freight train."

The defendant did not stop its train at the usual stopping-place, where it was safe for passengers to alight, but on the contrary, at an unusual place, where it was unsafe and dangerous, before reaching which the station, Paris, was announced, thereby inviting plaintiff, nothing to the contrary appearing, to get off when and where it stopped. These facts, in connection with the further facts that the night was very dark, and that passengers in the caboose could not for that reason see the danger, and that the conductor, on leaving the caboose with the light, could or might have seen it, made his failure to warn and inform the passengers of the dangerous character of the surroundings gross negligence.

But it is argued that plaintiff was also negligent in leaving the caboose under the circumstances, and that the demurrer to the evidence ought to have been sustained for that reason. We are of a different opinion. The slowing up of the train as it approached Paris, the sounding of the whistle, the announcement by the brakeman of the station, stopping the train, the act of the conductor and brakeman leaving the caboose with the light, the detachment of the engine to take water, can be construed in no other light than as a direction to the passengers to alight then and there; and plaintiff, in the absence of anything appearing to the contrary, had a right to conclude that it would be safe for him to alight at that place: *Leslie v. Railroad*, 88 Mo. 50; *Terre Haute etc. R. R. v. Buck's Adm'r*, 96 Ind. 347; Beach on Contributory Negligence, 173; and section 23, page 71, where it is said: "When the defendant, by his own negligent or wrongful acts or omissions, throws plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety induced by the defendant, — when there is, in reality, danger to which plaintiff is exposing himself in a way and to an extent which but for the defendant's inducement might be imputed to the plaintiff as negligence sufficient to prevent a recovery, — such conduct on the part of plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent, for the purpose of a defense to the action. . . . If the plaintiff exercises ordinary care and

prudence under the circumstances in relying upon defendant's inducement, or in obeying defendant's orders and directions, he may have his action."

It is next insisted that the second instruction given for plaintiff is erroneous, because it is too general, in telling the jury that if plaintiff exercised "due care," etc., and did not specifically set out all the circumstances tending to show contributory negligence. The instruction is as follows:—

"2. If the jury find from the evidence that plaintiff was a passenger on defendant's said train; and that it was dark when said train arrived at Paris; and that defendant's agents and servants stopped said train so that the caboose stood upon a high embankment, the side of which was perpendicular; and that said place was a dangerous place for passengers to alight from said train; and that said place was not the usual and ordinary stopping-place for freight trains at said station; and that the brakeman of said train announced the station; and that plaintiff, believing that said train was at its usual stopping-place, and that no other opportunity would be offered him to alight from said train at said station; and further find that defendant's said agents and servants neglected to warn plaintiff of the dangerous character of the place, or that he must not attempt to alight at said place; and that they carried away their lanterns and failed to furnish plaintiff any light by which to alight from said train,—they will find defendant guilty of negligence towards plaintiff; and if the jury so find the defendant guilty of negligence towards plaintiff, and that, as the direct and immediate consequence of such negligence on defendant's part, plaintiff, while exercising due care on his part, alighted from said train, and fell down the embankment at said dangerous place, and sustained the injuries complained of in plaintiff's petition, they will find a verdict for plaintiff."

We have already shown that it was not negligent in plaintiff in alighting from the train at the time he did; and inasmuch as there is nothing in the case before us to show that plaintiff in leaving the caboose was not exercising due care, the error complained of, if it may be so called, was immaterial, especially so in view of the evidence which would have justified the court in adding after the words "due care," "and there being no evidence tending to show that plaintiff was not exercising due care."

It is also insisted that the court erred in admitting evi-

dence to show that it was the custom and usage for defendant's freight trains to carry passengers. The fact of such custom was testified to by a number of witnesses, and that it was notorious, and the reception of the evidence was warranted by the following authorities: Wood on Master and Servant, sec. 401, p. 776; Lawson on Custom, 41, 42.

Nor was error committed in the reception of evidence to prove the usual stopping-place of freight trains at the station in Paris: *Tibby v. Railroad*, 82 Mo. 299; *Brassel v. Railroad*, 84 N. Y. 241; *Wood v. Railroad*, 49 Mich. 370.

The cause having been fairly tried, the judgment is affirmed, with the concurrence of the other judges.

RIGHTS OF PERSON RECEIVED AS PASSENGER on freight train: *Chicago etc. R. R. Co. v. Flagg*, 92 Am. Dec. 133, and note 137; *Arnold v. Illinois etc. R. R. Co.*, 25 Am. Rep. 383.

RIGHT OF PERSON TRAVELING ON FREIGHT TRAIN as passenger to recover for injury received through the negligence of the company or its employees: *Creed v. Pennsylvania P. R. Co.*, 27 Am. Rep. 693; *Houston etc. R'y Co. v. Moore*, 30 Id. 98; *Lucas v. Milwaukee etc. R'y Co.*, 14 Id. 735; *Eaton v. Delaware etc. R. R. Co.*, 15 Id. 513; *Dunn v. Grand Trunk etc. R'y Co.*, 4 Id. 267.

LIABILITY OF CARRIER WHERE STATION IS ANNOUNCED and train stopped before reaching it, whereupon passenger alights and receives an injury: *Mitchell v. Chicago etc. R'y Co.*, 47 Am. Rep. 566.

GAY v. GILLILAN.

[92 MISSOURI, 250.]

TO ESTABLISH UNDUE INFLUENCE SUFFICIENT TO AVOID WILL, the circumstances of its execution need not be inconsistent with every other hypothesis. All that is necessary is, that the evidence of the party attacking the will of a person of sound mind, on the ground of undue influence, shall preponderate over the evidence adduced and the presumptions prevailing on behalf of the proponents of the will.

MEANS BY WHICH UNDUE INFLUENCE over a testator is acquired are immaterial.

UNDUE INFLUENCE. — Persuasion, appeals to the affections, of ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, and the like, do not constitute undue influence. But pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is used or threatened.

IF UNDUE INFLUENCE IS ONCE SHOWN TO EXIST, every gift from the weaker party to the stronger is presumptively tainted by such influence; and the recipient must assume the burden of establishing its fairness and validity.

EQUITY WILL RELIEVE AGAINST FRAUD IN PROCURING WILL, if the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in obtaining the consent of the next of kin to the probate of the will.

EXISTENCE OF CONFIDENTIAL OR FIDUCIARY RELATIONS imposes upon the recipient of a gift the *onus* of establishing its absolute fairness. In the presence of such relations, a court of equity will presume confidence placed and influence exerted.

DISINHERITING BY TESTATOR OF SOME OF HIS CHILDREN, without apparent cause, imposes upon those claiming under the will the necessity of giving some reasonable explanation of its unnatural character.

H. C. McDougal and Prosser Ray, for the appellants.

Rush and Alexander, for the respondents.

By Court, **SHERWOOD, J.** This suit is a statutory proceeding to determine whether the instrument executed January 13, 1882, was the last will of Nathan Gillilan, deceased. He died December 17, 1882. Plaintiffs claim that it was made under undue influence, obtained and exercised by his son George, one of the defendants, and the principal beneficiary, by threats of taking his father's life. Other grounds were alleged in the petition,— that the testator was not possessed of sufficient testamentary capacity to make a will, and was intoxicated when he signed the instrument in question. The testimony exhibits a considerable degree of conflict as to whether the testator was intoxicated when the will was made, as to the condition of his mind at that time, and as to whether there was undue influence exerted in securing the execution of the will.

Objections are taken to the first instruction, given on behalf of the proponents of the will; it is as follows:—

“The jury are instructed that the only issue in this case is, whether or not the instrument in writing offered in evidence is the last will and testament of Nathan Gillilan, deceased. And if they find, from the evidence, that he signed in the manner testified by the subscribing witnesses, and at the time of such signing he had sufficient understanding to comprehend the transaction, the nature and extent of his property, and to whom he was giving the same, the jury should find that he had sufficient mental capacity to make a will, notwithstanding he was, from the use of intoxicating liquors, or otherwise, weaker in

body and mind than during his more vigorous manhood. And if the jury find that his understanding was thus sufficient, they should find that such instrument was and is the last will and testament of Nathan Gillilan, unless they further find that the making and signing thereof was procured by an undue influence, which amounted to a moral force or coercion, destroying free agency, and substituting the will of George W. Gillilan for that of his father; and there must be proof that it was obtained by force or coercion; and in order to set aside the will of a person of the sufficient mental capacity aforesaid, on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, which cannot be presumed, but must be shown in connection with the will; and it devolves upon those contesting the will to show such undue influence by a preponderance of the testimony."

This instruction is manifestly erroneous in that portion of it which declares that, "in order to set aside the will on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, which cannot be presumed, but must be shown in connection with the will; and it devolves upon those contesting the will to show such undue influence by a preponderance of the testimony." In civil cases "it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." In such cases "it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party": 1 Greenl. Ev., 14th ed., sec. 13 a; 3 Id., sec. 29. It will be observed that the portion of the instruction now being criticised lays down a rule as stringent in its operation in civil cases as the one which prevails in criminal cases. Indeed, it may be said that the rule laid down in this instance is more stringent than the one obtaining in criminal cases; for in the latter class of cases it is usual to use the qualifying word "reasonable" in connection with the word "hypothesis": *Wills on Circumstantial Evidence*, 149; *Commonwealth v. Costley*, 118 Mass. 1.

Here it will be noted that, in order to defeat the will of Nathan Gillilan on the ground of undue influence, the instruc-

tion in question requires the contestants to show that the circumstances of the execution of the will are inconsistent with any other hypothesis than such undue influence, whether such hypothesis was a fanciful or a reasonable one. Even if the qualifying word "reasonable" had been used in the instruction, it would have been unwarranted under the authorities cited. Elsewhere it has been determined that in a civil case an instruction is erroneous which required a party to establish his claim "by a clear preponderance of the evidence": *Bitter v. Saathoff*, 98 Ill. 266. In this court an instruction was condemned by intimation, no direct ruling being necessary, which made it a condition precedent to plaintiffs' recovery that they show by clear and certain proof that defendant did "maliciously kill," etc.: *Culbertson v. Hill*, 87 Mo. 553. In *Nichols v. Winfrey*, 79 Id. 544, an action for the wrongful and malicious killing of the plaintiff's former husband, it was laid down that it was not necessary, to a recovery of damages, that the defendant's guilt should be established beyond a reasonable doubt, but that it was sufficient for the plaintiff to make out her case in accordance with the rule prevalent in other civil cases. And Greenleaf, though in earlier editions asserting a different doctrine, yet in the last edition it is admitted in a note that the doctrine of the text is not well supported: 2 Greenl. Ev., 14th ed., sec. 426, and cases cited; 1 Id., sec. 13 a.

And I do not consider that the vice of the words commented on was neutralized by the remaining words of the instruction; for the jury; notwithstanding those remaining words, must have been impressed with the erroneous idea already conveyed to their minds by the former objectionable words. It is a fact deserving of much consideration that no case has been instanced by counsel where an instruction requiring that those who attack the validity of a will on the ground of undue influence should show that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, has received the sanction of an appellate court. It is true that the original of the idea conveyed by the words under discussion is thought to be found in the remarks of Lord Chancellor Cranworth, in *Boyse v. Rossborough*, 6 H. L. Cas., *loc. cit.*, 51.

But such observations, however appropriate when and where made, should not be used as the basis for an instruction to a jury trying an issue *devisavit vel non*. The remarks of the

lord chancellor were: "But, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis." I take it that these words do not go so far as at first blush they might seem to do. I think that the meaning they were intended to convey was simply this: that the burden of proof being on those who attack a will on the ground of undue influence, it is not sufficient for them barely to show that the circumstances of the will are consistent with the hypothesis of undue influence; for this would be but to create an equipoise in the testimony, and the *onus* being on the party attacking the will, he must go a step further, and show by any suitable evidence an inconsistency between the circumstances of the execution of the will and of its being executed without the interposition of undue influence. This is all, when rightly understood, I believe the remarks of the lord chancellor to mean. In other words, the evidence on the part of a party attacking, on the ground of undue influence, the will of a person of sound mind, must preponderate over the evidence adduced, and the presumptions prevailing, on behalf of the proponents of the will.

Briefly told, the testimony of disinterested witnesses, as to the exercise of undue influence by George over his father is this: Nathan, the father, at the time of the execution of the will in question, was nearly eighty years of age. Originally of a vigorous mind and body, years of excessive indulgence in strong drink, as well as advanced age, had greatly impaired his former mental and physical vigor. His son George had acquired dominion over him, as the following testimony shows. He frequently annulled "trades" his father had made. He caused his aged father great distress of mind by circulating reports that his father had debauched his wife. This he admitted when on the witness-stand, merely denying that he had ever accused his father of that crime to his face. He also admitted that he had told others that he would charge his father with that crime in his petition for divorce from his wife.

On the very morning of the day the will was made, George had a quarrel with his father, called him a liar, cursed him, seized a chair and threatened to mash him through the floor. When this occurred, his father fled through the door, crying

out, "Don't let him hurt me!" Thereupon James Clendenin, a grandson of the testator, was called to come in from the barn, and he did so, and rebuked his uncle for his brutal conduct. This was the testimony of Massingill, a tenant on the testator's farm, who also testified that George quarreled with his father whenever George came to his father's house, and his father seemed afraid of him. Massingill also testified that, on the occasion referred to, before George picked up the chair to strike his father, the latter had threatened to disinherit him, and reminded him of the falsehoods he had told about him respecting his wife. The testimony of Massingill is substantially corroborated by Mrs. Massingill, his wife. These witnesses are entirely disinterested, and they stand unimpeached. Their testimony is also supported by that of another disinterested witness,—the divorced wife of George,—plainly showing the dread with which George had inspired his father, and the fear the latter had, should he change his will, of being killed by his son. There is abundant evidence of the same sort throughout this record, but I have chosen to mention first that of impartial witnesses.

No one can read this record without being painfully impressed with the idea that George, by his most unfilial conduct and threats, had placed the mind of his aged and infirm father in complete subjection to his demands. And it can make no difference how such undue influence was acquired over the mind of a father, already enfeebled by advancing years and the infirmities incident to long-continued habits of excessive dissipation,—whether by slanders or threats, or by a combination of these unwarranted means. My ideas on this point I find very aptly and forcibly expressed in the charge of Sir J. P. Wilde, in *Hall v. Hall*, L. R. 1 Pro. & D. 481, where, in summing up, he gave the following direction to the jury on the question of undue influence: "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections, of ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist; moral command asserted, and

yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort,—these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

And where undue influence is once proved to exist, by whatsoever means produced or acquired, whenever the mind of one person is reduced to a state of vassalage to that of another, and a gift is shown to have been made by the weaker party to the stronger,—then the burden of proof will be shifted; the gift will become presumptively void, and the *onus* of upholding its fairness and validity will rest upon the shoulders of the recipient of the gift. This rule is firmly established in regard to gifts made by deed, and the same principle holds in regard to wills, and so this court has declared: *Garvin's Adm'r v. Williams*, 44 Mo. 465; 100 Am. Dec. 314; *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491.

And though it is said that a court of equity will not set aside a will obtained by fraud, though no satisfactory reason has ever been given why it should not do so, yet such a court will interfere "where the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in unduly obtaining the consent of the next of kin to the probate, courts of equity will lay hold of these circumstances to declare the executor a trustee for the next of kin": 1 Story's Eq. Jur., secs. 184, 252, 254, 283, 440. In *Gaines v. Chew*, 2 How. 619, Justice McLean, speaking for the court, gave a very strong intimation that if all other and ordinary methods of procedure failed of securing the requisite redress in the probate court, a court of chancery might feel called upon to fall back on its own inherent powers in order to accomplish the end desired. The foregoing instances of a court of equity refusing to interfere where fraud clothes the whole will as with a garment, and yet interferes where it vitiates with its foul touch "some particular clause," is the only instance to be found in the books where a court of equity fails to observe its predominant maxim to do "nothing by halves."

But notwithstanding the refusal of a court of equity to entertain jurisdiction of a proceeding to set aside a will obtained by fraud, yet those equitable principles which obtain in that

court respecting deeds and other contracts obtained by fraudulent contrivances are constantly and of necessity applied by courts of law in instances and upon issues like the present one. This was so ruled in the two cases cited from our own reports; and the rule is the same elsewhere. Where confidential or fiduciary relations exist, and a gift be bestowed or a contract be made between such parties, then the party occupying the attitude of guardian, agent, trustee, medical adviser, etc., who is the recipient of such gift, etc., has the *onus* to bear of establishing the absolute fairness of the given transaction: *Street v. Goss*, 62 Mo. 226, and cases cited; *Yosti v. Laughran*, 49 Id. 594, and cases cited; *Cadwallader v. West*, 48 Id. 483. And while it is true that undue influence will not be presumed, yet where such facts are proved as will authorize a jury to find the existence of undue influence, then the burden shifts, and it then devolves on the party charged to exonerate himself from such charge, in like manner as in the case of fiduciary or confidential relations.

Courts of law, when called upon for redress in such cases, give it on precisely the same principle that guides courts of equity in analogous cases. That principle of redress, in order to be fully efficacious, must be as broad in its application as the mischief it is designed to meet and to remedy. In the apt and forcible language of Sir Samuel Romilly, in his celebrated reply in *Huguenin v. Baseley*, 14 Ves. 285, 286, "the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another." The only diversity observable in the application of the principle in question being this: that in case of fiduciary relations, a court of equity will presume confidence placed and influence exerted. Where no such relations exist, the influence or the dominion acquired must be proved; but when proved, the rule which equity applies is the same in the latter as in the former class of cases: 2 Pomeroy's Eq. Jur., sec. 951, and cases cited; *Dent v. Bennett*, 4 Mylne & C. 269; *Smith v. Kay*, 7 H. L. Cas. 779, *per* Lord Kingsdown.

There is yet another ground why the *onus* should rest on the proponents of this will,—the testator, without apparent cause, virtually disinherited four out of six of his children, or their descendants. George received the "lion's share," and his brother John D. the substantial residue. It is laid down by a writer of eminent authority that "where the will is unreasonable in its provisions, and inconsistent with the duties of

the testator with reference to his property and family, . . . this, of itself, will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will": 1 Redfield on Wills, 516. "Gross inequality in the dispositions of the instrument, where no reason for it is suggested, either in the will or otherwise, may change the burden, and require explanation on the part of those who support the will to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind": 1 Redfield on Wills, 537; *Lynch v. Clements*, 24 N. J. Eq. 431, and cases cited.

For the reasons given, the instruction must be held erroneous, and the judgment is reversed and the cause remanded, with directions to proceed in conformity with this opinion.

UNDUE INFLUENCE, PRESUMPTION OF IN CASE OF SPIRITUAL ADVISERS, including professed spiritualistic mediums: See *Conner v. Stanley*, *ante*, p. 84. What influences operating upon testator are regarded as legitimate: See note to *Clapp v. Fullerton*, 90 Am. Dec. 690; *Floyd v. Floyd*, 49 Id. 626; and *Small v. Small*, 16 Id. 253, and note 257-263. Confidential relations give rise to presumption of undue influence: *Garvin's Adm'r v. Williams*, 100 Id. 314, and note.

STATE v. THURSTON.

[92 MISSOURI, 325.]

CONSTITUTIONAL LAW. — Entire statute need not be set forth in an act amending it by adding new sections or altering old ones. It is only when all the sections of a statute are amended that the entire act, as amended, must be set out in the amendatory statute.

Draffen and Williams, for the appellant.

Boone, attorney-general, for the state.

By Court, NORTON, C. J. The defendant was indicted in the Cooper County circuit court, as a druggist and pharmacist, for selling intoxicating liquors in less quantities than one gallon without a written prescription first had and obtained from a regularly registered and practicing physician. Defendant was tried, convicted, and fined one hundred dollars, and has appealed to this court; and the sole ground relied upon for a reversal of the judgment is the alleged unconstitutionality of the act of the legislature on which the indictment was founded.

The act of 1883 (Acts 1888, p. 90), on which the indict-

ment was found, amends the act of 1881 (Acts 1881, p. 130) by adding three new sections thereto, and amending section 8 of said act, the section 8 as amended being set out in full in the amendatory act. It is claimed by counsel that said amendatory act is violative of section 34, article 4, of the constitution, because it does not set out in full the whole of the act amended. Said section 34 is as follows: "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

It will be perceived that this section does not forbid the amendment of an act by the passage of an act adding new sections to the act amended; and it will be seen that any section of a statute or act may be amended, provided the section, when amended, shall be fully set forth in the amendatory act as amended. It is only when all the sections of an act are amended that the entire act as amended is required to be set out: *State v. Chambers*, 70 Mo. 625.

The act in question is not open to the objection urged against it, and the judgment is hereby affirmed, with the concurrence of the other judges.

STATUTES, AMENDMENT OF BY SECTIONS, WHAT REQUIRED: *Underwood v. McDuffee*, 93 Am. Dec. 194, and note; Sedgwick on Statutory and Constitutional Law, Pomeroy's notes, 532.

McFADDEN v. MISSOURI PACIFIC RAILWAY COMPANY.

[92 MISSOURI, 342.]

PETITION IN ACTION AGAINST COMMON CARRIER alleging the delivery and loss of the property through negligence in managing and operating the train is sufficient.

COMMON CARRIER CANNOT BY ANY SORT OF STIPULATION exempt himself from the consequences of his negligence, though he may, by special or express contract, or special acceptance, fairly and understandingly made, limit his common-law liability.

WHERE MULES ARE DELIVERED TO COMMON CARRIER, and the car in which they are transported is bedded with straw, and placed next to the engine, which placing of the mules is unusual, dangerous, and negligent, and the car is set on fire from sparks emitted by the engine, and the

mules thereby destroyed, a stipulation in the bill of lading that the carrier is not liable for "the risk of loss or injury to the mules by fire, or any account whatever," is so far invalid, and no protection to him.

ALL PRIOR VERBAL NEGOTIATIONS BETWEEN SHIPPER and common carrier are merged in the bill of lading or contract of shipment, and the shipper cannot admit the execution of the contract, and avail himself of the fact that he did not read the same, or know its contents, where no mistake, fraud, imposition, or deceit is charged.

BILL OF LADING, OR CONTRACT OF SHIPMENT, stipulating for a reduced or special rate of freight, is not conclusive, but only *prima facie* evidence, open to explanation and contradiction.

WHERE BILL OF LADING FALSHELY RECITES that a special and reduced rate of freight is given, and the shipper, in consideration therefor, agrees to accept a limited valuation for the property transported, in case of its loss through the negligence of the carrier, the contract is not binding on the shipper, and the stipulation as to limited valuation is void, as releasing the carrier for his liability for negligence.

Portis and Portis, and Shirk, for the appellant.

Cosgrove and Johnston, for the respondent.

By Court, RAY, J. Plaintiff brought this action in the circuit court of Cooper County against the defendant, as a common carrier, to recover the value of a car-load of mules delivered to defendant at Boonville, to be transported over its railroad to the state line at Kansas City. Whilst in transit, the car containing the mules caught on fire, and thirteen head were burned to death, and the other three so injured as to be a total loss to the plaintiff.

An objection was made to the introduction of any evidence, upon the ground that the petition did not state facts sufficient to constitute a cause of action, which said objection was properly overruled. The petition not only alleged the delivery and loss of the mules whilst in defendant's possession as a common carrier, which was sufficient, but charged negligence in managing and operating the train, whereby the car was set on fire, and the mules burned, injured, and destroyed. No other point was made in respect to the pleadings, and we need not set them out.

The evidence of plaintiff shows the delivery of the mules by plaintiff to defendant; that the car in which they were transported was bedded with straw, and placed next to the engine; that this was not customary, but unusual and dangerous, and prudence required that such cars should be placed at a greater distance in the train from the engine; that the rear of the train was the safest place, whilst next to the engine was, for such cars, the most dangerous, on account of the liability of the

straw bedding to take fire from the sparks of the engine. It should be also stated that the train in question consisted of fifteen or twenty cars, but two of which, beside the one in question, were loaded with stock, and of these, one was placed next to the car containing the mules injured by the fire, or second from the engine, whilst the other was put near the rear end of the train, and next to the caboose. This was the substance of the evidence in chief in behalf of plaintiff.

Defendant offered no oral testimony in the cause, but relied upon the bill of lading or contract of shipment, which it set up in the answer and read in evidence at the trial. The evidence in rebuttal will be considered later in the course of this opinion.

It has been held in this and most of the states, that, by special or express contract, or special acceptance, fairly and understandingly made, the carrier may limit his common-law liability. The shipper may lawfully, if he sees fit, surrender the obligation of the carrier as an insurer of his property, but the law is firmly settled in this state that the common carrier cannot, by any sort of stipulation, exempt himself from the consequences of his own negligence. We need not again discuss that question.

If placing the car bedded with straw containing the mules next to the engine was unusual, negligent, and dangerous, and the car was set on fire by sparks from the engine, and the mules thereby destroyed, all of which the evidence for plaintiff shows, without any attempt at contradiction from defendant, then, under numerous rulings of this court, the provision in the contract, whereby the plaintiff assumed "the risk of loss or injury to the mules by fire, or any account whatever," would be so far invalid, and no protection to the defendant.

In an analogous case the supreme court of Pennsylvania, in considering the liability of common carriers, say: "A defective wheel, or axle, or frame-work, would confessedly render them liable, even as against the release. The carrying of a combustible article so near the engine as to be exposed to sparks was even more inexcusable; for this could not escape observation, as defects in the vehicle might": *Powell v. Railroad*, 32 Pa. St. 414; 75 Am. Dec. 564; see also *Holsapple v. Railroad*, 86 N. Y. 275. At all events, in the absence of all opposing evidence on the part of defendant in that behalf, this court must, after verdict, assume the negligence of defendant, and dispose of the case under that view.

But the stipulation in the contract of shipment most relied on for a reversal of the judgment is the one declaring the company should not be liable for more than one hundred dollars per head for the mules. Such a stipulation, it is claimed, is valid and binding, and does not contravene the rule which forbids the carrier to stipulate against his own negligence. Numerous decisions sustain such stipulations, when fairly made, and where the parties agree on a fixed valuation of the property, and a special and reduced rate of freight is given and received, based upon the condition that the carrier assumes liability only to the extent of the agreed value of the property: *Hart v. Railroad*, 112 U. S. 331, and cases cited.

Other decisions deny the validity of such provisions, and hold them void, as releasing the carrier from the full and proper liability for the consequences of his negligence: *Black v. Trans. Co.*, 55 Wis. 319; 42 Am. Rep. 713; *Moulton v. Railroad*, 31 Minn. 85; 47 Am. Rep. 781; *United States Express Co. v. Backman*, 28 Ohio St. 144. Hutchinson on Carriers says, in substance, that the cases cited by him as recognizing the right of the carrier to thus limit the liability as to value occur in states in which the law permits the carrier, by special and express contract, to relieve himself of the consequences of his negligence in the carriage of goods, and that these cases would not be considered controlling authority in those states in which such claim to exemption is not permitted to be made: Secs. 247, 250.

But even under the rule declared in the former class of decisions, these provisions, thus employed and resorted to by common carriers to restrict their liability, are to be tested by their fairness, justice, and reasonableness. We will consider the case before us briefly under this view. The answer charges that defendant agreed to transport the mules for plaintiff, between said points, at the rate of thirty-one dollars per car, which was charged to be a special and reduced rate, lower than the regular rate. The written contract read in evidence recited that the said rate was a reduced rate, made in consideration of agreement, etc. The execution of the contract was not admitted, but denied in the reply. The evidence, however, showed that it was in fact signed by the agent of plaintiff after the mules were loaded into the cars, and just before the train started. This court has heretofore held that all prior verbal negotiations between the parties are merged in the written contract, and that the plaintiff cannot admit

the execution of the contract, and avail himself of the fact that he did not read the same or know its contents, where no mistake, fraud, imposition, or deceit is charged to have occurred.

In this case plaintiff claimed, and was permitted to show by parol evidence, that the said recital in the contract of shipment that the rate named was a reduced rate was false, and that the same was the usual and customary rate charged all shippers for similar shipments of such stock by the car-load. The oral evidence in that behalf was not objected to by defendant, when offered by plaintiff, and no exception saved to its admission in evidence. The following is the substance of this evidence, as given in the abstract for plaintiff, and is, we believe, correct:—

R. S. Moore testified that he was the agent of the railway company at Boonville; that the bill of lading in evidence was of the same form in use by the company in April, 1884, and had been for a year before that time. Everybody that shipped stock used this form. This is the regular rate of shipment of stock by the car-load. The rates on other classes of freight per car-load were much higher, considering the value of the mules. These were the usual rates paid by all shippers of stock by the car-load.

Mr. Frost, who acted in behalf of plaintiff in making the shipment, and signed the contract, testified that nothing was said about the bill of lading being a special contract; that he never asked for reduced rates, but that he shipped the stock and signed the bill of lading in this instance just as he had done in all others, when acting for other shippers, and that so far as he knew, the bill of lading in this case was the ordinary one, and signed by him in all other cases of stock shipment.

The written contract was not, we think, under these circumstances, conclusive evidence, but merely *prima facie* evidence, that the given rate was a special and reduced rate. As between the parties, it was, in this respect, open to explanation, and impeachable for error, mistake, or false statement. The reduced rate, if such it was, was the consideration for the exemption from liability beyond the one hundred dollars, even in case of injury and loss from defendant's negligence, and parol evidence in that behalf is, we think, competent and admissible for the purpose indicated. The consideration clause in bills of lading, contracts, deeds, and other instruments,

ordinarily, has only the force and effect of a receipt, and is open to explanation and contradiction by parol evidence: *Hutchinson on Carriers*, secs. 122, 123; *Fontaine v. Boatman's Sav. Inst.*, 57 Mo. 552; *Hollocher v. Hollocher*, 62 Id. 267; *Edwards v. Smith*, 63 Id. 119.

But even if this is not so, it devolved upon the defendant to make the objection to the admissibility, and save the exception, if the objection was overruled, and having failed to do so, no complaint can now be heard at his instance in that behalf. This case, then, under this state of facts, does not fall within the rule declared in *Hart v. Railroad*, 112 U. S. 331, and others cited by counsel for plaintiff. In the case of *Hart v. Railroad*, *supra*, especially relied on, the discussion was had upon the terms of the bill of lading alone, and as the court say, "without any evidence upon the subject, and especially in the absence of evidence to the contrary"; and under the qualifications it contains, we cannot regard it as controlling authority in a case where the evidence clearly shows absence of reduced or lower rate, or any graduation of compensation to the valuation.

On the one hand, it may be, as is there said, unjust, unreasonable, and repugnant to sound principles of fair dealing, for the shipper to reap the benefits of a contract by which he secures a lower rate than the carrier might reasonably charge for the service rendered, if there be no loss, and to repudiate it in case of loss. Where the shipper procures the lawful rates of the carrier to be reduced in express consideration of the agreed value, upon which the compensation is based, he is, under numerous authorities, some of which are cited, held to be estopped to say the value is greater when the loss occurs. On the other hand, it would, we think, be no less unfair, unreasonable, and unjust that the carrier, without any sacrifice of his interest, or lawful demands, or diminution of his lawful charges, should secure, without any consideration therefor, such important advantages and release of liabilities to which he would otherwise be subjected under the law.

Another case especially relied on is the case of *Harvey v. Railroad*, 74 Mo. 538, which we deem distinguishable from this present case, and which we will now examine briefly. In the first place, the action was brought upon a special contract. The horse was alleged to be of the value of ten thousand dollars, and the value was limited by the contract to the sum of one hundred dollars. The answer set up the affirmative

defense, that the defendant had certain regular rates of transportation for horses of ordinary value, and that for those of greater value five per cent on the owner's valuation was charged in addition; that defendant asked plaintiff or his agent the value of the horse, and that said value was falsely represented to be one hundred dollars, and that said valuation given by the plaintiff was then agreed on. Defendant offered evidence tending to establish the matters set up in the affirmative defense, and instructions numbered two and three, submitting this evidence to the jury, were refused by the court. The third was to the effect, in substance, that if Dickson intentionally misrepresented the value of the horse, and stated it much lower than it actually was, for the purpose of procuring the lower rate, then plaintiff could only recover the value which he had fixed.

This court held it error to have refused the instructions asked, and said: "We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties, as representing the true value of the property shipped, as a contract in any way exempting the carrier from the consequences of its own negligence. Such a contract fairly entered into leaves the carrier responsible for its negligence, and simply fixes the rate of freight, and liquidates the damages. This, we think, it is competent for the carrier to do. And where the reduced value is voluntarily fixed by the shipper with a view of obtaining a low rate of freight, without any knowledge on the part of the carrier that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than that fixed by him."

In the case now before us, there was no pretense that the plaintiff or his agent fraudulently concealed or falsely represented the real value of the mules. They were delivered without any inquiry or representations as to value. They may have been a somewhat choice lot of mules, but they were not of extraordinary or fanciful value, such as blooded stock, or on account of speed or other qualities, as in the Harvey case, and there is no pretense that defendant was in any way deceived as to their value, or misled as to the degree of care they would require. On the other hand, the recital that the given rate was a reduced rate was in fact false, as was shown by the evidence of the station-agent, who testified it was the usual rate charged all shippers.

If, in the one case, it is competent for the carrier to show that the real value of the property was concealed, and the lower rate thus secured by the fraud, or deceit of the shipper, why may not the shipper be permitted to show that the alleged reduced rate, in consideration of which he surrendered the obligation imposed by law upon the carrier, as an insurer of the property, was false, and in fact no reduced rate at all. It may be that plaintiff was not deceived by it at the time, as he did not ask for or suppose he was getting a reduced rate, but if the pretended lower rate was the usual rate, and known to be such to both parties, it would work a fraud upon the rights of plaintiff, under the law, if the defendant were permitted to treat it as a lower rate, and to thus deprive plaintiff of important rights, and thus secure release of part of its liability by reason thereof.

Under the circumstances of this case, there was, we think, no consideration for the limited valuation placed upon the mules by defendant, and the stipulation in that respect is, we think, void, as releasing the carrier from the full and reasonably adequate liability for its negligence. The instructions given for the plaintiff were in harmony with these views, whilst those refused for the defendant were not in accordance therewith.

Finding no error in the record, we affirm the judgment, and it is so ordered.

COMMON CARRIER MAY BY EXPRESS OR SPECIAL CONTRACT limit his common-law liability, but cannot stipulate for exemption from liability arising from his negligence: *Illinois etc. R. R. Co. v. Smyser*, 87 Am. Dec. 301; *Bismuthal v. Brainerd*, 91 Id. 349; *Illinois etc. R. R. Co. v. Adams*, 92 Id. 85; *Mobile etc. R. R. v. Hopkins*, 94 Id. 607; *Indianapolis etc. R. R. Co. v. Cox*, 95 Id. 640; *Grace v. Adams*, 97 Id. 117, and notes to these cases; *Grogan v. Adams Express Co.*, 60 Am. Rep. 360, and cases referred to in foot-note; see also *Baltimore etc. R. R. Co. v. Rathbone*, 88 Am. Dec. 664, holding that the carrier may stipulate against liability for negligence.

CARRIER OF ANIMALS CANNOT STIPULATE AGAINST NEGLIGENCE: Note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 215; *East Tennessee etc. R. R. Co. v. Johnston*, 51 Am. Rep. 489; *Moulton v. St. Paul etc. R'y Co.*, 47 Id. 781; *Kansas City etc. R. R. Co. v. Simpson*, 46 Id. 104.

CARRIER IN CONSIDERATION OF REDUCED RATE of freight, how far may stipulate for limitation of liability in carriage of animals: *Georgia R. R. v. Beattie*, 42 Am. Rep. 75; *Georgia R. R. v. Spears*, 42 Id. 81; *South and North Alabama R. R. Co. v. Henlein*, 23 Id. 578; note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213-217.

IN ABSENCE OF FRAUD OR MISTAKE, contract for transportation of animals, signed by the shipper, is the sole evidence of the agreement, although it

differs from a previous oral contract, and the shipper did not read it: *St. Louis etc. R. R. Co. v. Cleary*, 46 Am. Rep. 13.

BILL OF LADING, CONCLUSIVENESS OF, as evidence of the contract to carry: *Grace v. Adams*, 97 Am. Dec. 117, and note; *Graves v. Lake Shore etc. R. R. Co.*, 50 Am. Rep. 282; *McMillan v. Michigan etc. R. R.*, 93 Id. 208.

SMITH v. WABASH, ST. LOUIS, AND PACIFIC RAILWAY COMPANY.

[92 MISSOURI, 359.]

TRAIN DISPATCHER WHO HAS CONTROL of the movement of trains and engines, and to whose orders conductors and engineers are subject, is not a fellow-servant with those actually engaged in operating and moving trains, but is the representative of the company.

TRAIN DISPATCHER BEING REPRESENTATIVE of the company, the latter is liable for his negligence causing injury to an employee of the company, acting under his orders, whether verbal or written, as required by the rules of the company.

TRAIN DISPATCHER WHO, AS REPRESENTATIVE OF COMPANY, determines that he cannot give written orders, as required by the rules, but gives verbal orders to meet an emergency, such orders are the act of the company; and if its employee, acting under such orders, is injured through the negligence of the train dispatcher, the company is liable.

THOUGH IT IS ERROR TO LEAVE CONSTRUCTION OF WRITTEN RULES and regulations of railroad company for the jury, still such error will not be noticed when made in favor of the party excepting.

IN ACTION AGAINST RAILROAD COMPANY for damages sustained through its negligence, the jury should be instructed to take into consideration all the circumstances, and what are aggravating and what are mitigating should be pointed out; but a failure in this respect is not error when there are no mitigating circumstances in the case.

EXCESSIVE VERDICT IS CURED by entering a *remittitur* in the appellate court for a smaller sum.

Blodgett and Burnett, for the appellant.

Waters and Wyne, for the respondent.

By Court, NORTON, C. J. This is an action to recover damages for the killing of plaintiff's husband, alleged to have been occasioned by the negligence of defendant, in which she recovered judgment for five thousand dollars, from which the plaintiff has appealed; and, among others, assigns as error the action of the court in refusing to instruct that, under the pleadings and evidence, plaintiff was not entitled to recover. A proper disposition of this question necessitates a review of the evidence, which shows that freight train No. 84 arrived from the west, on the morning of the 15th of December, 1881,

at Stanberry, a station on the line of defendant's road, and the end of a division of said road, extending from Stanberry to Omaha; that, upon its arrival, it was discovered that the caboose belonging to it had become detached, and was left standing on the track four or five miles west of Stanberry; that, at the time of the arrival of train 84, another freight train, No. 85, with engine No. 112 attached to it, was standing on the track already made up, and ready to start going west. The conductor of this train, James E. McCarty, testified that his engine was No. 112; that Mike Bahn was his engineer and deceased his fireman; that his train was to go out; that he was standing by the train dispatcher's window when train 84 came in, and Luke Ferriter, train dispatcher, said to him: "Jim, you will have to take your engine and go after that caboose, I guess, as it will save time"; that he asked Ferriter about orders, and Ferriter said he couldn't give him orders as there was no operator at Conception; that there was nothing coming east behind 84, and that he would be perfectly safe in going. Witness then said: "I told him I would go down and see Mike; that if Mike would go, I would go after the caboose. I went down there and saw Mike, and we concluded to go after the caboose, and we started off after it promptly, without going back to the dispatcher's office"; that they found the caboose between three and four miles west of Stanberry, coupled on to it, and started back, and had gone perhaps a mile, when they collided with the switch-engine.

Mr. Bondurant, who at the time of the accident was yardmaster at Stanberry, testified as follows: That train 85 was made up and on the track ready to go west when train 84 whistled for Stanberry; then, when 84 arrived, he discovered there was no caboose on the train; that, as the yard was blocked, he told the engineer of train 84 to go to the roundhouse, and that he would go after the caboose, the engineer having said he did n't think it was a great way back; that he went up to see the train dispatcher, Mr. Ferriter, and the latter asked him if No. 85 had gone, and he answered "No," that they could n't go until Burns arrived; he had charge of the train that came in without the caboose; he then said to him: "Ferriter, had n't we better go and get the caboose, as it was lost up the road two or three miles?" that Ferriter asked him if 112 had gone, and he answered "No"; that he did not ask him if they had gone after the caboose, and he understood him to have reference to 112, with train 85; that Ferriter then

old him that he had better go and get the caboose with the switch-engine; he then asked Ferriter if he would need orders, and he said "No," it was not necessary to have any, that he would protect him while he was gone, and would let nothing out till he got back; he then went down, got on the switch-engine, and started, with three men on the engine besides himself; they met 112 about five miles west of Stanberry, backing up with the caboose; the two engines collided, and plaintiff's husband was killed; that he did not notice what engine was standing in the yard when he left.

It was argued that the rules and regulations for the movement of trains and engines, in force at the time of the accident, and printed on time-table 49, were known and understood by the conductor and engineer in charge of engine 112, by the yard-master in charge of the switch-engine, and by the train dispatcher. Plaintiff also put in evidence the following rules, printed on said time-table 49:—

"Rule 62. The superintendent and appointed train dispatchers are the only persons authorized to move trains by telegraph.

"Rule 63. No wood, construction, or extra train, or engine, must be run upon the road, without written orders or instructions from persons authorized to move trains.

"Rule 64. All telegraphic orders for the movement of trains will be addressed to conductors and engineers. The operator receiving such an order will read it aloud to the conductor and engineer, and receive their understanding in writing; will repeat it back to the dispatcher precisely as sent. If correctly repeated, the dispatcher will return the signal, 'O. K.,' which must be acknowledged by the operator by a like signal, followed by his initial and office call. The operator will indorse the dispatcher's O. K. on the order, and deliver it to the conductor and engineer to whom it is addressed. In no case will an operator repeat an order until he has first obtained, in writing, the understanding and signature of both conductor and engineer.

"Rule 65. Should the line, from any cause, fail to work, before the party has received the O. K., he will not deliver such order."

Defendant, on its behalf, put in evidence the following rules, printed on time-table 49, and not offered by plaintiff:—

"Rule 18. Always take the safe side in cases of the least uncertainty.

"Rule 14. Trains are to be run under the direction of the conductor, except when his directions conflict with rules or involve any risk or hazard, in either of which cases all participants will be held alike accountable.

"Rule 66. The greatest care and watchfulness must be exercised in sending and receiving orders in regard to running trains. Operators will not trust the delivering of train orders to other parties, but will deliver them in person.

"Rule 68. All orders and messages relating to the movement of trains must be written in full, and no abbreviation used except the telegraph signals '9' (repeat back) and '13' (I understand that I am to —)."

The defendant also introduced as witnesses, on its behalf, J. W. Blanchard, formerly superintendent of the Council Bluffs and Omaha division of defendant's road; W. I. Durbin, train-master, and for many years a train dispatcher for defendant; Mr. Beggs, a conductor, and Mr. McConnel, a locomotive-engineer, both of whom were in defendant's employ at the time of and before the accident. The evidence of these witnesses tended to show that, under the rules, as they were understood and acted on by the employees on that division, an engine sent out on the line, beyond the switch limits of a station, after a caboose, would be an extra engine, and only authorized to go on a written order; that the running of irregular extra trains or engines was done only on written orders, issued by the train dispatcher; that time-table 49 was prepared by Thomas McKissock, general superintendent of defendant's road, and issued to the division superintendents, and distributed by them to the employees on their respective divisions; that the engines in question, in their movements after said caboose, were extra engines, and that under the rules it required that orders for the movement of said engines should be in writing; that the observance of said rule would tend to prevent collisions, and its non-observance would be likely to result in collisions; that it was the duty of the employees in charge of the engines in question to refuse to go out upon the road without orders in writing, and that the train dispatcher had no authority to direct them to go, except by an order in writing, and signing the name or initials of the division superintendent thereto; that upon receiving the order in writing (if one had been given in this case) it would have been the duty of the person in charge of engine 112 to have gone to the registry book, at Stanberry, and registered his engine out. and when he returned, to

register it in; that the train dispatcher issues his orders in three copies, on manifold paper, one of which is delivered to the conductor, one to the engineer, and one he retains, and the order is recorded in a book; that had the train dispatcher given a written order to the engineer and conductor of engine 112, when the yard-master asked for orders to go with the switch-engine, the train dispatcher would not have given him an order until the order to the engineer and conductor of engine 112 had been canceled; but that, had he made a mistake and done so, the yard-master, when he came to register out the switch-engine, would have discovered that engine 112 was out on the road, and could not have gone until that engine was registered in; that the accident in question resulted from the non-observance of the rules, and that had the rules, as they were understood and acted upon by all the employees on that division, been observed, the accident could not have occurred.

On cross-examination, Mr. Blanchard, division superintendent, testified that Ferriter, the train dispatcher, had power, under the rules, to control the movement of trains and engines, and that while he (Blanchard) had the same authority to move trains that the dispatcher had, he never assumed that authority, but loaded it on to the train dispatcher, and that the latter exercised the entire authority; that the engineer of engine 113, attached to freight train 84, could and should have gone back, without any orders, for the caboose, if it could have gotten out of the yards, even if the caboose had been left as far back as twenty miles. On cross-examination, Mr. Durbin testified that when the yard-master found that the caboose had been left back on the road, and that engine 113 could not get out to go after it, it was his duty to inform the train dispatcher of the fact, and to ask for orders to go after it with the switch-engine, and that it was the duty of the train dispatcher to give the orders; that the train dispatcher should have kept the switch-engine from going, if he knew the first engine had gone, and Blanchard testified that the train dispatcher, without much effort, could have ascertained whether the engine had gone. The train-master further testified, among other things, that the first fault was the train dispatcher's, in giving a verbal order, and the other fault was of the engineer, in obeying it.

It is insisted by counsel that the facts in evidence, which are substantially as above set forth, show that the death of plaintiff's husband was occasioned by the negligence of his fellow-servants, and that therefore the court erred in overrul-

ing the demurrer to the evidence. If the train dispatcher, yard-master, engineer, and firemen of engine 112 were fellow-servants, then error was committed by the court in the above respect; but if the train dispatcher was not a fellow-servant, but the representative of the company, in regard to the movement of trains on the division referred to in the evidence, and his negligence was the proximate cause of the injury, the demurrer was properly overruled. It clearly appears from the evidence that the train dispatcher at Stanberry had the sole and exclusive control in directing the movement of trains on the division of defendant's road extending from Stanberry to Omaha, and that the conductors and engineers were subject to them when issued.

The authorities bearing upon the question as to whether or not a train dispatcher, invested with such control, is a fellow-servant with the conductor and engineer, and others engaged in actually operating and moving trains, are conflicting and irreconcilable. The rule laid down in Massachusetts, and cases cited from other states, where it is held that all who are engaged in a common employment, working to accomplish a common result, without regard to rank, are to be regarded as fellow-servants, supports defendant's contention. While this court has held that where one servant is injured by the negligence of a fellow-servant no action therefor can be maintained against the master only in exceptional cases (such as when the servant employed was incompetent, which was either known, or might with ordinary care have been known, by the master), we have never gone so far as to adopt a rule by which to determine who are fellow-servants so broad as that adopted in Massachusetts, nor are we disposed to do so now.

The tendency of recent decisions is to narrow, and not to broaden, the rule; notably so in the case of *Chicago etc. Railroad v. Ross*, 112 U. S. 390, where it is said: "There is a clear distinction to be made, in relation to their common principal, between the servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." In *Sheehan v. Railroad*, 91 N. Y. 332, and *Chicago, B., & Q. Railroad v. McLallen*, 84 Ill. 109, the superintendent and assistant superintendent, acting as train dispatchers, were held to be vice-principals. In the case last cited it is said that, as

between the conductor and the company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation, and that the rule applies as well to all orders issued by his assistants and in his name.

That a train dispatcher is to be regarded as the representative of the company is, in effect, held in the following cases: *Booth v. Railroad*, 73 N. Y. 38; 29 Am. Rep. 97; *Railroad v. Henderson*, 37 Ohio St. 552; *Washburn v. Railroad*, 3 Head, 638; 75 Am. Dec. 784; *Darrigen v. Railroad*, 24 Am. Law Reg. 453. In the case last cited it is said: "It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty, and all liability, to those in its service." It is previously said that "cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience,—some one must hear and obey. . . . It [the railroad company] must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. . . . Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act promptly and efficiently." In this case, the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them, a train dispatcher, acting in the name and by the authority of the superintendent. Is there not a wide difference between the duty of such an agent and the duty of a locomotive-engineer? The duty of the former pertains to management and direction; that of the latter to obedience.

What is here said applies to the facts of the case before us, which shows that when freight train 84 arrived at Stanberry from the west, freight train 85 stood on the track ready to go out west, the direction from which 84 had just come, but could not go out because 84 had left its caboose back some

four or five miles on the track, between Stanberry and Conception, a station on the road.

The evidence is undisputed that the engineer of the engine which pulled 84 into the yard had the right, and it was his duty, to take his engine, and without orders, either verbal or written, to go back, if for the distance of twenty miles, and bring in the caboose; but owing to the crowded condition of the yard, he could not get his engine out, and he was ordered by the yard-master to take it to the round-house. In this condition of things, the train dispatcher directed McCarty, conductor, to take engine number 112, which was hitched to freight train 85, and bring in the caboose, saying "he could not give him written orders because there was no operator at Conception, but that he would be perfectly safe in going, as there was no train coming east"; whereupon he was informed by McCarty that he would see his engineer, and if he consented they would go. He did go, and from the very fact of his not returning to the train dispatcher, that officer could have drawn no other inference than that he had gone, and this inference could have been reduced to a certainty had he looked to ascertain the fact as to whether or not he had gone; but instead of this, with full knowledge of the fact that McCarty left telling him that he would go if his engineer would, with an assurance from his dispatcher that it would be perfectly safe for him to go, he directed the yard-master to take his switch-engine and bring in the caboose, promising to protect him while he was gone, without informing him that he had previously directed McCarty to go with engine 112, and without taking any steps to ascertain whether he had gone, which fact he could have ascertained by taking a few steps and simply looking, and it was this negligence that cost the fireman on engine 112 his life.

But it is earnestly insisted that, inasmuch as rule 26 forbade an extra engine from going out without written orders, McCarty was negligent in refusing to go without them. If the train dispatcher was the representative of the company in ordering the movement of trains, as we hold he was, then, under the emergency and condition of things existing when he determined that he could not give written orders, it was the determination of the company, and when he gave the orders verbally, as he did to meet the emergency, it was the company speaking. If the engineer who pulled train 84 into Stanberry had informed the train dispatcher that his caboose

had been left behind, and that he could not get out of the yard with his engine to go after it, and had procured the use of engine 112, attached to train 85, for the purpose of going, and had gone after it, and had the train dispatcher afterwards instructed the yard-master to take his engine and go, and the accident occurred as it did, could there be any question as to the liability of the company? We think not.

Upon the point under discussion, the case of *Moore v. Railroad*, 85 Mo. 588, has a direct bearing. In that case it appeared that the company had established a rule requiring all car repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work, as signals of warning to approaching trains. Notwithstanding this rule, the foreman of car repairs directed the plaintiff, without any flags being set out as required by said rule, to repair the drawhead of a car, promising to protect him while so engaged, and an engine ran against the car, severely injuring him, the company was held liable, on the ground that the foreman was the *alter ego* of the company, and his promise of protection was binding, although the rule provided to secure the safety of the men had not been observed, but dispensed with.

It is next objected that the court erred in the second and third instructions given for plaintiff, in that the jury were told that if they found from the evidence that Ferriter was train dispatcher, and under the rules and regulations of defendant he had control of the movement of trains and extra engines, and if under said rules and regulations he had control of the two engines in question, so far as running them on the road was concerned, and if under said rules and regulations, and by reason of them, said employees were subject to the orders and instructions of said train dispatcher, in relation to the running of said engines, then said train dispatcher was not a fellow-servant of the engineer. The specific objection made to these instructions is, that it was the duty of the court to construe the rules and regulations read in evidence, and that it was error to leave the construction of them to the jury.

This position is well taken, and error was committed in the respect above noted, but the error was one in favor of defendant and against the plaintiff, inasmuch as the rules admitted of but one construction, as to the fact that the train dispatcher had control of the movement of trains and engines, and con-

trol of the engines in question, as to running them on the road, and subjecting the employees to his orders and instructions; and had the court construed the rules, it could only have told the jury that under them the train dispatcher had such control, and that the employees were subject to his orders.

It is also insisted that the court erred in the instruction given in relation to damages, in this, that the jury were told that they might take into consideration the mitigating and aggravating circumstances, without pointing out to them what circumstances were aggravating and what mitigating. While it is held in the case of *Rains v. Railroad*, 71 Mo. 169, 36 Am. Rep. 459, that the court in its instruction should point out such circumstances, it is also said in the case of *Nagle v. Railroad*, 75 Mo. 653, 42 Am. Rep. 418, that where there are no mitigating circumstances the defendant cannot complain of such an instruction because of its generality. In this case, we do not perceive a single mitigating circumstance, but on the contrary, the grossest negligence of the train dispatcher in sending out the second engine under the circumstances disclosed by the evidence.

It is also insisted that, under the facts found, plaintiff was only entitled to nominal damages. The evidence is, that the deceased was the head of a family, thirty-nine years of age, able to perform the duties of fireman, and was so engaged when killed, and was always at work. These facts formed a basis on which the jury were authorized to find more than nominal damages.

As to the claim made that the verdict for five thousand dollars was excessive, it may be said that it is sufficiently answered by the action of plaintiff in entering a *remittitur* in this court for the sum of fifteen hundred dollars.

It is alleged in the petition that "the train dispatcher gave an order which, under the rules and regulations of the company, the men were bound to obey," and it is contended that this allegation was not proved, inasmuch as the order given was a verbal and not a written order. The company, through its train dispatcher, determined that, under the existing circumstances, a written order could not be given; and having thus determined, gave a verbal order, which, emanating from the company through its representative, the train dispatcher, was obligatory.

Inasmuch as the entry of a *remittitur* in this court by plaintiff, of the sum of fifteen hundred dollars, is to that extent an

admission that the point made by defendant, that the judgment for five thousand dollars is excessive, is well taken, on the authority of the case of *Miller v. Hardin*, 64 Mo. 545, the judgment of the circuit court is in all respects affirmed, except as to said sum of fifteen hundred dollars, which is remitted, and to be deducted from the said sum of five thousand dollars; and plaintiff and appellee is required to pay all costs of this appeal, which are adjudged by this court against her.

SHERWOOD, J., dissented.

RAILWAY TRAIN DISPATCHER AND LOCOMOTIVE-ENGINEER are not fellow-servants: *Darrigan v. New York etc. R. R. Co.*, 52 Am. Rep. 590.

WHO ARE FELLOW-SERVANTS AND LIABILITY OF MASTER for the negligence of one servant who has control of another: Note to *Fox v. Sanford*, 67 Am. Dec. 590-596.

ERROR IN INSTRUCTION FAVORABLE TO APPELLANT is not ground for reversal of the judgment: *Wintz v. Morrison*, 67 Am. Dec. 658, and note 664; *Sawyer v. Chicago etc. R'y Co.*, 99 Id. 49, and note.

LANCASTER v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

[92 MISSOURI, 460.]

PARTY IS NOT RELIEVED FROM LIABILITY FOR INJURIES RESULTING FROM FALL OF WALL, on the ground that it was constructed by an independent contractor, if the defect in the wall arose from the plans and specifications adopted by such party, and not from negligence of the contractor in carrying out such plans and specifications.

PROVISION IN BUILDING CONTRACT that the work shall be done in a good and workmanlike manner relates to the things specified to be done, and does not impose on the builder the duty of doing acts or taking precautions which ought to have been, but were not, provided for in the plans and specifications.

RIGHT TO SUE FOR DAMAGES TO REAL ESTATE is not destroyed nor assigned by a subsequent conveyance of such real property.

SAME CAUSE OF ACTION MAY BE STATED IN DIFFERENT COUNTS; in which case, there need be but one finding or verdict. A nominal verdict for plaintiff on one count, and a substantial verdict for him on the other, shows that the jurors intended to award damages under the latter only; and the judgment cannot be arrested on the ground that there are two verdicts for the same cause of action.

Dyer, Lee, and Ellis, for the appellant.

Broadhead and Haeussler, for the respondent.

By Court, BLACK, J. The plaintiff and the defendant owned adjoining lots fronting on Fourth Street, in the city of St. Louis, extending back to an alley. There was a five-story brick building upon each lot, the wall between them being a party-wall. The first count of the petition, in substance, states that in September, 1881, the defendant erected upon its property a brick wall, so as to abut against the party-wall; that the same was carried to a great height; that the defendant negligently caused the wall to be erected in such an insecure and defective manner, and with such insufficient foundation and supports, that the supports gave way, and the wall fell upon plaintiff's building, crushing it, to the damage, etc. The second count states that the defendant erected the new wall in such a manner as to bear with great weight upon a girder, which was negligently inserted into the party-wall without providing a sufficient foundation or supports therefor; and that defendant negligently omitted to employ competent and skilled men to superintend and construct the wall and other alterations of the old building. In other respects this count is the same as the first.

The defendant's property is known as the old St. Nicholas Hotel, and the plaintiff's, which is to the south of the other, is known as the Nelson House. Plaintiff's building extended from the street on the east to the alley on the west, and the St. Nicholas Hotel building extended west to within some thirty-five feet of the alley. It is shown that the greater portion of the party-wall between the St. Nicholas and the alley was in a bad condition, was cracked, and the bricks in places were well rotted from heat and moisture, from a laundry attached to the St. Nicholas. The condition of this portion of the party-wall was well known to both parties. The defendant determined to convert the St. Nicholas Hotel into store-rooms, and to that end entered into a written contract, plans, and specifications with Messrs. Barnes and Morrison, contractors and builders. It appears that the plans and specifications were prepared by the contractors, but it is equally clear that they were approved by the defendant at the home office, and were approved and signed by the defendant's agents, Messrs. Budd and Wade, at St. Louis. In the execution of the contract according to the plans, it became necessary for the contractors to remove the rear wall of the St. Nicholas Hotel, and place it some six or eight feet towards the alley,—twenty-five feet east of the alley. This new wall rested upon

a girder, and extended to a height of four stories above the ceiling of the first story. The north end of the girder was supported by the defendant's north wall, and the south end was inserted in the party-wall. The girder was of two pieces joined at the center, and there supported by an iron column. After the new wall had been built, or nearly completed, it and the rear wall of the plaintiff's house fell down.

There is much evidence to the effect that the party-wall, at the place where the new one joined it, was weak, to the knowledge of the defendant's agents, and that the only safe way to build the new wall was either to place a pillar or abutment next to the party-wall, and let the girder rest on that, or to firmly anchor both ends of the new wall into the side walls, and that neither was done. There is evidence to the effect that by building an abutment, or placing a pillar of iron at the party-wall, there would have been no danger. On the other hand, there is evidence tending to show that a pillar or abutment was not necessary; that the party-wall at the point of juncture was sound and safe; that the party-wall next to the alley fell from its inherent weakness, dragging with it the new wall, and other portions of the party-wall, to a point eight or ten feet beyond the place where the two walls joined.

The jury returned the following verdict: "We, the jury, find for the plaintiffs on the first count, and assess their damages at one dollar. We, the jury, find for the plaintiffs on the second count in the petition, and assess their damages at the sum of four thousand nine hundred dollars."

1. A question made by the appellant is, that Barnes and Morrison were independent contractors, and they, and not the defendant, are liable for the injuries resulting to the plaintiff's house. If the negligence which produced the injury was not in the workmanship, or the materials to be furnished by the contractors, but in the plans and specifications, then the defendant cannot be relieved from liability, or shift the responsibility to the contractors: *Horner v. Nicholson*, 56 Mo. 220; *Morgan v. Bowman*, 22 Id. 538. It was the duty of the defendant to use all reasonable care and caution in providing plans and specifications, to the end that a building, when constructed in accordance with them, would not be dangerous to the plaintiff's property. The instructions for plaintiff are in entire accord with what has been said, for they proceed upon the theory that the plaintiff could recover, though Barnes and Morrison were independent contractors, provided the injury

arose from and was occasioned by the use of defective plans. But it is contended, on the other hand, and correctly too, that if the plans and specifications were in themselves sufficient to secure a safe construction of the work, and that the work was insufficiently done by independent contractors, then the defendant should not be held liable. This principle of law is incorporated in an instruction given at the request of the defendant.

It is, no doubt, the duty of the court to construe written contracts, and in view of this, it is earnestly contended that the court erred in refusing to give the following instruction, asked by the defendant:—

“5. The court instructs the jury that, under the contract, plans, and specifications read in evidence in this cause, it was the duty of the contractors, Barnes and Morrison, to erect, in a good and substantial manner, the improvements in said contract, plans, and specifications named, and to this end it was not necessary to insert in the plans, specifications, and contract the manner in which the wall to be erected on property of defendant was to be supported.”

The purpose of this instruction would seem to be to throw the duty of placing supports under the girder on the contractors, though not specified, and this on the ground that the contract required them to do the work in a good, workmanlike manner. The contract is general in its terms, and refers to the specifications. The specifications provide, in detail, for the various kind of work, including the iron, stone, and brick work. Among other things, they provide that “the partitions, walls, archways, stairs, etc., that conflict with the plans, are to be taken down or filled up as may be required”; and in speaking of the brick-work, that “the old work to be joined on the new in the very best manner, and anchored where directed.” Although the specifications deal with details, there is nothing said with respect to a support at the party-wall, upon which that end of the girder should rest. We do not understand that anything of the kind is shown on the drawing. It is clear that a pier or pillar at the party-wall, to support the girder, was not contemplated by the contract. Where it is provided that the work shall be done in a good and workmanlike manner, or in the very best manner, those words must relate to the things specified to be done. The claim made by the appellant, that the words “as may be required” and “where directed,” mean required and directed

by Barnes and Morrison, cannot be sustained; such a reading of them is at war with the very object and purpose of the contract. It makes the contractors do, and only do in the respects mentioned, what they may require themselves to do. The directions are to be given by the defendant or its agents. No other construction can, in reason, be given to them. Again, these words apply to matters of detail, and in no event can they be construed to require the contractors to erect a pier, or place an iron column under the end of the girder. The instruction attempts to give to the contract a construction which it will not bear, and was properly refused.

2. The court gave an instruction, at the request of the defendant, which, after stating that the plaintiff makes no claim for damages, except such as were occasioned by the falling of the wall built by the defendant, concludes as follows: "The plaintiff cannot recover in this action, unless she has proved to the satisfaction of the jury that said abutting wall fell before said party-wall." The claim here is, that the evidence all shows that the party-wall fell first, and that the jury disregarded the instruction. Both counts do conclude with the statement that the defendant's wall fell upon the plaintiff's house, crushing it, etc.; but the grievance complained of is, that defendant failed to place supports under the girder, by reason of which the party-wall gave way. If the party-wall yielded to the weight upon it, and caused both walls to fall, we do not see how it is material which came to the ground first. The instruction may be, in a sense, misleading, but the defendant cannot be heard to complain of such an error, brought about at its own request.

3. After the damages had accrued, and shortly before the commencement of this suit, the trustee sold the property; but it is not claimed that there was any assignment of the damages to the purchaser or any one else. Mr. Lancaster, the trustee, held the property in trust to apply the rents and income to the sole and separate use of Mrs. Nelson, a married woman, with power to sell the property. The property had been rented, the tenants accounting to the trustee, and he to Mrs. Nelson. It is true that, upon the sale of the property, the trustee's dominion over it ceased, but his right and power to collect the damages remained unaffected by the sale. He certainly would have been required to discharge any debt previously contracted in respect of the property, and might have

collected any unpaid rents, notwithstanding the sale; and in like manner, he may prosecute this suit.

4. Finally, it is insisted that the judgment should have been arrested, because there are two verdicts for the same cause of action. It is now settled in this state that, under our code, the plaintiff may state the same cause of action in different counts of the petition: *Brinkman v. Hunter*, 73 Mo. 172. Where there are separate and distinct causes of action joined in the same suit, but stated in separate counts, as they should be, there should be a separate finding upon each count: *Bricker v. Railroad*, 83 Id. 391. But where there is but one cause of action, though stated in different counts, there need be but one finding or verdict. The verdict, in such cases, may be general. It need not mention either count: *Brownell v. Railroad*, 47 Id. 240; *Brady v. Connelly*, 52 Id. 19; *Owen v. Railroad*, 58 Id. 394. As stated in the case last cited, a finding upon any one count would be a bar to a recovery on the other counts,—upon any of the counts. Regularly, there should have been either a general verdict, or a verdict upon one of the counts. A verdict upon one count for plaintiff, and a finding for the defendant on the other, would also have been proper enough. In this case, the verdict on the first count is but for one dollar,—a nominal finding for plaintiff. Practically, it is a finding for defendant on that count. There can be no possible doubt but the jurors intended to award substantial damages; and this they did do on the second count. That verdict is supported by abundant evidence on fair instructions, and there is no such error as to materially affect the merits of the action, in view of the fact that the plaintiff has remitted one dollar in this court.

The *remittitur* will be entered, and the judgment affirmed, for four thousand nine hundred dollars, to bear interest from date of the judgment in the circuit court. The costs of this appeal, in this court and the court of appeals, will be taxed to respondent.

ACTS FOR WHICH DEFENDANT IS NOT ANSWERABLE BECAUSE DONE BY CONTRACTOR: See *Wabash, St. L., & Pac. R'y v. Farver*, 60 Am. Rep. 696, and cases there cited; *Boswell v. Laird*, 68 Am. Dec. 345, and note; *Stone v. Cheshire R. R.*, 51 Id. 192, and note 200-206.

CRAWFORD v. SPENCER.

[92 MISSOURI, 438.]

SALE OF GOODS TO BE DELIVERED IN FUTURE is valid, though there is an option as to the time of delivery, and the seller has no means of getting them but to go into the market and buy. But if, under guise of such contract, valid on its face, the real purpose and intention is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and the market price only paid, the transaction is a wager, and the contract void.

TO RENDER CONTRACT FOR SALE OF GOODS to be delivered in future void as a wagering contract, it is not enough that one party only intended a speculation in prices; it must be shown that both parties did not intend a delivery of the subject-matter, but contemplated and intended only a settlement of the difference between the contract and the market price.

BROKER MAY NEGOTIATE CONTRACT FOR SALE of goods to be delivered in future, without being privy to an illegal intent of the principals, rendering it void; and being innocent, he has a meritorious ground for the recovery of compensation for services and advances.

WHEN BROKER IS PRIVY TO UNLAWFUL DESIGN OF PARTIES to a contract for the sale of goods, to be delivered in future, and brings them together for the purpose of entering into the illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.

WAGERING CONTRACT FOR FUTURE SALES is not within the provisions of the Missouri criminal statutes, making gambling notes void in the hands of the holder; therefore a note based on such contract is not void in the hands of an indorsee before maturity, simply because based upon such consideration.

NOTE BASED UPON ILLEGAL WAGERING CONTRACT assigned as collateral, with an extension of time for the payment of the principal debt, constitutes the assignee a holder for value for a new consideration, and freed from the equities existing between the original parties of which he has no notice, the collateral not being due when assigned, and he can enforce his security to the extent of the debt due him from his assignor.

BILL OF EXCEPTIONS CONSISTING OF TESTIMONY of witnesses, letters, etc., as taken by the stenographer, and copied, signed by the judge, attached together, and followed by a skeleton bill of exceptions,—as, "Plaintiff was then sworn as a witness, and testified as follows [here insert his testimony]," and so as to various witnesses, depositions, etc., except that the motion for a new trial is copied in full, and all is attached together and signed by the judge,—is sufficient, under the Missouri practice, and authorizes the clerk to fill up the skeleton bill with the evidence, depositions, etc., when called for.

Campbell, for the appellants.

Reynolds, Dinning, and Byrns, and Thomas, for the respondent.

By Court, **BLACK, J.** The plaintiff brought this suit to enjoin the proposed sale of real estate under a deed of trust given by him to secure his note, dated the 9th of November,

1881, for five thousand dollars, due in one hundred days, and payable to the order of Harlow, Spencer, and Company. The members of this firm were made defendants by the petition, but it appearing that the note had been assigned to D. R. Francis and Brother, the members of that firm were brought in by amendment, and the suit proceeded against all these parties and the trustee to a final decree, as prayed for by the plaintiff.

The ground for relief is, that the note grew out of alleged gambling contracts, for the purchase and sale of wheat and corn. The evidence shows that the plaintiff, who resided at De Soto, in this state, had been, for some months prior to the date of the note, speculating in option deals in grain, through Harlow, Spencer, and Company, brokers, at St. Louis, and through them he became a member of the Merchants' Exchange. At the date of the note the brokers called upon the plaintiff for two thousand dollars margin, in addition to what he had before paid. At that time they were indebted to him in the sum of \$2,536, on account of closed transactions, but they were then carrying unclosed deals, upon which margins were due to them. On the entire account, it is clear that plaintiff owed them as much as two thousand dollars, and perhaps as much as five thousand dollars. Plaintiff was about to leave the state, on matters connected with his business as railroad contractor, and he states that he gave the note and deed of trust to them, that they might use it to raise money if it became necessary so to do, on account of pending or future deals. Harlow, Spencer, and Company say the note and deed of trust were given to them to secure them against loss, as the plaintiff desired to use his money in other business; and this, we conclude, was the real nature of the transaction, for it cannot be claimed but the brokers, at the date of the note, were entitled to at least two thousand dollars, on account of the face of the then past and pending transactions.

Harlow, Spencer, and Company failed on the 10th of February, 1882. They then had contracts for twenty thousand bushels of May corn, and thirty thousand bushels of May wheat, which they had bought for plaintiff. They instructed the persons from whom they had purchased the grain to close out the deals, which was done, and an account rendered for the loss, which was settled by the brokers. Harlow, Spencer, and Company then rendered an account to the

plaintiff, showing a balance due to them of \$7,128. When Harlow, Spencer, and Company failed, they owed D. R. Francis and Brother, who were also brokers, some twenty-six thousand dollars, and they turned the plaintiff's note over to the latter firm, on account of that indebtedness.

There is much conflict in the direct evidence of the plaintiff and the members of the firm of Harlow, Spencer, and Company, as to the real character of these transactions. The plaintiff says he became acquainted with a member of the firm, and after frequent conversations as to the speculations then going on, he concluded to make some deals; that it was the distinct understanding between him and the brokers that no grain would be delivered or received, but that differences only would be settled, and in this he is corroborated by the evidence of Mr. Norton, who was interested with the plaintiff in some of the early transactions. Harlow, Spencer, and Company say there was no such understanding, and that the deals were to be, and were, all made in good faith, and contemplated an actual delivery of the commodity, though delivery might be dispensed with. The brokers did buy and ship to plaintiff a small quantity of corn for use, but that was paid for at the time, and does not enter into the transactions in question; the difference between the manner in which that transaction was conducted and these in question is of some significance. It is an undisputed fact in the case that not a grain of wheat or corn was ever delivered under any of the contracts in question. They were all closed out and settled by the adjustment of differences, and in all cases before the maturity of the contracts. That they were all mere speculations is not denied. The plaintiff made, and intended to make, no arrangement for the delivery or reception of any of the grain, and this was at all times well known to the brokers. The brokers were engaged in an extensive business, many times in excess of the amount of produce handled by them. It was the especial duty of one of the firm to look after transactions like those in question. If we look to the bare assertion of the parties, on the one side and the other, we might well conclude that plaintiff has failed to make out a case; but if we look to the attending circumstances, which we must do, we can but conclude that these transactions, as between the plaintiff and the brokers, were mere speculations upon the future price of wheat and corn, with a complete understanding, on the part of both, that no grain was, in any case, to be

received or delivered. It is true the contracts were all made in the names of the brokers, the name of the real principal not appearing; that they were in writing, and, under the rules of the exchange, the purchaser had the right to call for the commodity; but they were made by the plaintiff's brokers, in compliance with their understanding with him, and it is believed with an implied understanding with the persons with whom the deals were made that no grain was to be delivered.

The law is now well settled, that a sale of goods to be delivered in the future is valid; such a contract is valid, though there is an option as to the time of delivery, and though the seller has no other means of getting them than to go into the market and buy them; but if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only paid, then the transaction is a wager, and the contract is void. It is not enough to render the contract void that one party only intended by it a speculation in prices; it must be shown that both parties did not intend a delivery of the goods, but contemplated and intended a settlement only of differences. The burden of showing the invalidity of the contract rests upon the party asserting it: *Irwin v. Williar*, 110 U. S. 499; *Cockrell v. Thompson*, 85 Mo. 510.

With respect to a suit by the brokers for services rendered and moneys advanced for the principal in procuring these wagering contracts, it was said, in *Irwin v. Williar*, 110 U. S. 499: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that, when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transactions." In the present case, the note was given by the plaintiff to the brokers to protect and save the latter harmless because of these illegal transactions, then pending, and thereafter to be made. The illegal ventures were carried on by the brokers in

their own names, and they were parties thereto from first to last,—parties to the agreements which made the contracts illegal. The case comes clearly within the principles asserted in the case last cited, where it is said the brokers cannot recover.

In the case of *Cockrell v. Thompson*, 85 Mo. 513, Cole Brothers were the brokers or factors. They made the ventures for Cockrell and Thompson. The deals were closed out, and Cockrell then settled with the brokers, and sued Thompson for one half of the losses thus paid to Cole Brothers. From the report of the case, it would seem that the contracts for the purchase and sale of the wheat were made in the name of Thompson and Cockrell by the factors. At all events, it was not alleged or shown that Cole Brothers did not make for Cockrell and Thompson valid contracts. There was no charge that any seller or buyer who dealt with Cockrell and Thompson through the brokers did not intend to deliver or receive the wheat. It did not, therefore, appear, nor was it alleged, that the contracts made were illegal. In the present case, we are satisfied that it was not only the understanding with plaintiff and his brokers that the deals were mere speculations on prices, but that such was also the character of the contracts, as between the brokers and the persons with whom they made the contracts. There is therefore nothing in the Cockrell-Thompson case inconsistent with the principle of law before asserted. It follows that the plaintiff is entitled to the relief demanded, as against Harlow, Spencer, and Company.

It remains to be seen whether he is entitled to the relief as against Francis and Brother. We do not agree with counsel for the plaintiff, that the note is void in the hands of a *bona fide* indorsee, because of our statute upon the subject of gambling. These statutes, section 5721–5723, Revised Statutes, 1879, make all notes “where the consideration is money or property won at any game or gambling device” void. The assignment of such a note, the statute says, shall not affect the defense. Under these statutes it was held in *Hickerson v. Benson*, 8 Mo. 9, 40 Am. Dec. 115, that a wager on the result of an election was not within their meaning. Subsequently the statute was so amended (sec. 5726) as to include bets and wagers on elections, but the amendment does not include such contracts as those here in question. The sections of the statute before noted are evidently designed to be in aid of the criminal law. This much is said in the case of *Williams v.*

Wall, 60 Mo. 320. It cannot be said that contracts like those in question come within the provisions of the criminal statutes. These wagering contracts are void, not because prohibited by statute, but because they are against public policy. The note is not void in the hands of an indorsee before maturity, simply because based upon such a consideration. This is the view taken of the statute in *Third National Bank v. Harrison*, 10 Fed. Rep. 243, and we believe it to be the correct one.

The evidence does not show that Francis and Brother had notice of the infirmity existing in the note when they took it, which was before maturity; nor is the validity of the debt due to them from Harlow, Spencer, and Company fairly impeached. But the further claim is, that they took the note as collateral security for a pre-existing debt, and therefore hold the note subject to any defense existing between the original parties. The proof is, that Harlow, Spencer, and Company owed Francis and Brother twenty-six thousand dollars, on open account. The day before Harlow, Spencer, and Company failed, they gave to Francis and Brother notes, including the one in question, amounting to twelve thousand dollars, in payment of that amount of the indebtedness; this left fourteen thousand dollars unpaid, which was settled and paid at fifty cents on the dollar, and the entire account receipted in full. Afterwards, Harlow, Spencer, and Company took up half the notes, by a cash payment; this left six thousand dollars of the notes, including the one in question, in the hands of Francis and Brother; some of the notes were small, and to avoid protest fees, Harlow, Spencer, and Company, who were indorsers, gave Francis and Brother their note, also, for six thousand dollars, the latter retaining plaintiff's note. There is still due on this note from six hundred to two thousand dollars; the evidence is not definite in this respect.

In *Goodman v. Simonds*, 19 Mo. 107, it was said: "We do not say that a bill of exchange, passed to a person in payment of a pre-existing debt, would be liable in his hands, without notice, to the equities or defenses of the original parties; but that the holder of a bill merely as collateral security for a pre-existing debt, having given no value for it,—no consideration for it,—holds it liable to such equities." This case was cited, but not mentioned in the opinion, in the subsequent case of *Boatman's Savings Institution v. Holland*, 38 Id. 51. Subsequently, it was held that one who takes a note as collateral

security for a debt then created is a holder for value: *Logan v. Smith*, 62 Id. 455. And still later it was held that if the creditor extends the time of the payment of the principal debt until the collateral shall become due, the agreement to delay constitutes the transferee of the collateral a holder for value: *Deere v. Marsden*, 88 Id. 512. Where there is a new consideration at the time the collateral is given, such as the extension of the time of the payment of the principal debt, there can be no doubt but the transferee of the collateral takes it freed from equities existing between the original parties, of which he has no notice, the collateral not being due when transferred. Where there is no such new consideration, there is much conflict in the authorities. But in this case, we are satisfied that the notes, amounting to twelve thousand dollars, were taken in actual payment of that amount of the indebtedness of Harlow, Spencer, and Company, and that being so, Francis and Brother took the note freed from the equities existing as between plaintiff and Harlow, Spencer, and Company: *Daniel on Negotiable Instruments*, 3d ed., sec. 332.

It is true that after Harlow, Spencer, and Company gave Francis and Brother their note for six thousand dollars, the plaintiff's note for five thousand dollars is spoken of as a collateral to the six-thousand-dollar note; but we do not see that the giving of the new note by Harlow, Spencer, and Company, as a substitute for their indorsement, puts Francis and Brother in any worse condition than they were when they took plaintiff's note in payment of five thousand dollars. In any possible view of the case, payment of five thousand dollars of the indebtedness of Harlow, Spencer, and Company to Francis and Brother was extended until the note in question matured, and had it been received by Francis and Brother as collateral security, and not in payment, the extension of time, under the authorities before cited, would have constituted them holders for value, for a new consideration. On the evidence as it now stands in this case, Francis and Brother are entitled to enforce this security to the extent of the amount due to them from Harlow, Spencer, and Company.

3. It is insisted by the plaintiff, respondent here, that the evidence is not preserved by the bill of exceptions, and for that reason the judgment should be affirmed. In obedience to a writ of *certiorari*, issued at the instance of the plaintiff, the clerk has sent up an exact copy of the bill of exceptions as it was when signed by the judge and filed in the court below.

It consists of 172 pages of testimony of witnesses, letters, and the like, as taken down and copied by the stenographer, attached together by means of strings. Then follows a skeleton bill of exceptions. As an example, it states: "Plaintiff was then sworn as a witness, and testified as follows [here insert testimony of Samuel W. Crawford]"; and so with the various witnesses and depositions and motions, except the motion for new trial, which is copied in full; and then follows the signature of the judge. All these papers are attached together by another fastening. The skeleton bill was made out in compliance with the practice which prevails in this state. The depositions and motions were sufficiently identified, and the evidence of the witnesses sworn in open court was written out, and actually attached to the skeleton bill before the judge signed the same. No more could be desired. The bill is sufficient in all respects. Under these circumstances, the clerk was authorized to fill up the skeleton bill with the evidence, depositions, and motions, when called for.

There is no need of a new hearing, so far as the members of the firm of Harlow, Spencer, and Company are concerned, and the judgment is, therefore, as to Corwin B. Spencer, John F. Carpenter, and Thomas H. Morgan, affirmed; but as to the other defendants the judgment is reversed, and the cause remanded for a new hearing on the issues between them and the plaintiff.

CONTRACTS FOR SALE OF PERSONAL PROPERTY TO BE DELIVERED IN FUTURE. — The question of the validity of contracts for the sale of personal property to be delivered in the future — sometimes called "futures" — is one of special importance in this country. These contracts may be entirely valid, or they may be objectionable as wagering or gaming contracts, either on general principles, or because obnoxious to some statutory provision. The purpose of this note will be to discuss the question in all its bearings.

STOCK-JOBGING ACTS, AND OTHER STATUTES. — In 1734, when speculation in public stocks or securities had become so prevalent that the whole business community was infected and demoralized by it, Parliament passed "An act to prevent the infamous practice of stock-jobbing": 7 Geo. II., c. 8; which was made perpetual in 1837: 10 Geo. II., c. 8. The object of the act was to prevent gambling in certain funds by parties who never intended to buy or sell, but merely to speculate upon the future price of stock, by making what are called "time bargains," and compounding for differences: *Dos Passos on Stockbrokers*, 383. It was directed against fictitious sales of stock; and was not intended to affect *bona fide* sales, where the stock was actually transferred, although the seller was not possessed of it at the time of making the contract: *Mortimer v. McCallan*, 6 Mees. & W. 58; nor did it apply where the seller was really possessed of the stock intended to be transferred: *Sanders v. Kentish*, 8 Term Rep. 162; *Child v. Morley*, 8 Id. 610;

although the broker who made the sale did not disclose the name of his principal when the bargain was made: *Child v. Morley*, *supra*. Again, the act only applied to "public" stocks and securities, and not to railway and joint-stock shares: *Williams v. Trye*, 18 Beav. 366; *Hewitt v. Price*, 4 Man. & G. 355; 5 Scott N. R. 227; Time bargains in foreign funds were, furthermore, not within its prohibitions: *Elsworth v. Cole*, 2 Mees. & W. 31; 2 Gale, 220; *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *Oakley v. Rigby*, 3 Scott, 194; 2 Bing. N. C. 732; *Morgan v. Pebrer*, 4 Scott, 230, 235; 3 Bing. N. C. 457, 463; *Henderson v. Bise*, 3 Stark. 158; nor were such agreements illegal by the common law: *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722. The statute was thus of limited operation; but nevertheless, a change of sentiment seemingly having occurred, it was considered as imposing "unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities," and it was therefore repealed in 1860: 23 & 34 Vict., c. 28.

In two of the states of this country statutes provide that every contract, written or verbal, for the sale or transfer of stocks or bonds of the United States, or of any state, or corporation, public or private, is void, unless the vendor is at the time of making the contract the owner or assignee thereof, or authorized by such owner or assignee, or his agent, to sell and transfer the same, — Massachusetts (Pub. Stats. of 1882, c. 78, sec. 6) and South Carolina (Stats. of 1883, No. 306, sec. 1). In New York a similar statute existed: 1 R. S. of 1829, p. 710, sec. 6; but it was repealed by Laws of 1858, chapter 134, which provide that no such contract shall be void or voidable for such reason, or for want or non-payment of the consideration. In the South Carolina statute there is an express saving clause, which makes the contract valid, if it was the *bona fide* intention of both the parties thereto, at the time, that the certificate, bond, or other evidence of debt should be actually delivered and received in kind at the specified period in the future. The constitution of California also says: "All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it, by suit in any court of competent jurisdiction": Art. 4, sec. 6. In conformity with the foregoing, it is held that a contract for the transfer of shares in the capital stock of a company incorporated under the statutes of another state is void, unless the contracting party was at the time of making the contract the owner or assignee thereof, or authorized to sell or transfer the same: *Barrett v. Mead*, 10 Allen, 337. So a vendor must hold the stock which he contracts to sell at a future day, free from other liabilities and obligations that have already exhausted it as the basis of a contract of sale: *Stebbins v. Leowolf*, 3 Cush. 137; but where a broker, employed to purchase stock, contracted for it in his own name with a person who owned it at the time, but had made a prior contract of sale, and the employer, for groundless reasons, repudiated the contract, but the broker, having no knowledge of or reason to suspect the prior sale by the seller, paid for the stock when tendered to him, the statute did not debar the broker from recovering from his employer the amount so paid: *Brown v. Phelps*, 103 Mass. 313. The statute avoids the contract only when the vendor does not own the shares at the time it is made. Therefore, a contract to deliver in the future one hundred shares of stock, the vendor owning them at the time, and having a right to transfer them, is good, although he sell all but forty shares intermediate the contract and the time of transfer: *Frost v. Clarkson*, 7 Cow. 24. So a promise by the holder of more than three hundred

shares of stock of a certain corporation to transfer three hundred shares, whenever he should acquire enough to do so and still retain a majority of the shares in the corporation, is not within the statute: *Price v. M'not*, 107 Mas. 49; nor is an agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties to the agreement, he having bought it through a broker on a margin: *Bullard v. Smith*, 139 Id. 492; nor an agreement by which one party was to purchase stocks for the other and sell them within a certain time, the profits to be divided but the loss to be borne by the former: *Barrett v. Hyde*, 7 Gray, 160. A party who has either bought or sold stock, which the vendor did not own, on time, and who has advanced the difference between the time of the sale and the time appointed for the delivery of the stock, may recover back the money paid, under 1 N. Y. R. S., p. 710, sec. 8: *Gram v. Stebbins*, 6 Paige, 124.

- Statutes broader in their terms have been passed in several other states. These statutes differ in their details, but the following will indicate their general scope: The buying or selling or otherwise dealing in "futures" is made a misdemeanor in Arkansas (Dig. of Stats. of 1884, secs. 1848, 1849); Mississippi (Laws of 1882, c. 117); Ohio (Laws of 1885, p. 254; R. S., sec. 6934 c); Texas (Laws of 1887, c. 113); in other states the statutes say that the buying or selling of stocks, bonds, grain, cotton, petroleum, pork, or any other commodity, on margin, without any intention of future delivery, is a misdemeanor: Iowa (Laws of 1884, c. 93; Rev. Code of 1886, p. 959 a, confined to "mercantile or agricultural products"); Kentucky (Stats. of 1884, c. 1613, restricted to the city of Lexington); Michigan (Pub. Acts of 1887, c. 199, "on margins or otherwise"); Ohio (Laws of 1885, p. 254); Tennessee (Acts of 1883, c. 251); and the keeping of "bucket shops," or places where such business is transacted, is likewise made a misdemeanor: Iowa, Michigan, Texas; and such contracts are in words declared unlawful: Iowa, Kentucky, Michigan, Mississippi, Ohio, Tennessee; but in Iowa it is expressly provided that the act shall not apply to nor in any way affect any contracts for the actual buying or selling of any commodity, where the actual delivery or receipt of the thing sold is contemplated, and in good faith intended by either of the parties to the contract; and the South Carolina statute contains a similar proviso: Stats. of 1883, No. 306, sec. 1. In Wisconsin it is enacted that contracts for future delivery shall not be void when either party shall in good faith intend to perform the same; that an intention by either party not to perform the contract shall not vitiate it, if the other party shall in good faith intend to perform it; and that the contract shall not be void because the vendor is not at the time it is made the owner of the property contracted to be sold; and it is further provided that in any action on such contract it shall not be competent to show in defense, by extrinsic evidence, that the contract had any other intent or meaning than that expressed or stipulated, but evidence is admissible to show fraud, want of consideration, or that both parties intended a wagering contract: Laws of 1881, c. 81 (R. S., sec. 2319 a).

In Illinois it is provided that whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, shall be fined or imprisoned in the county jail, and all contracts made in violation of the section shall be considered gambling contracts, and void: R. S. of 1883, c. 38, sec. 130 (Crim. Code, sec. 130). In Ohio, it is also enacted that all agreements by which any person shall contract to sell or buy flour, grain, or meat, of

which he is not the owner, and has not the possession, or when the purchaser has not the means to pay, or does not intend actually to deliver or to receive and pay for the same, are illegal and void: Laws of 1885, p. 254 (R. S., sec. 6934 b). The statute of South Carolina further provides that every contract for the sale or transfer, at any future time, of any cotton, grain, meats, or any other product, shall be void, unless the party contracting to sell or transfer the same is at the time of making such contract the owner or assignee thereof, or authorized by the owner or assignee, or his agent, to enter into the contract, unless it is the *bona fide* intention of both parties that there shall be an actual delivery and receipt in kind, at the period in the future specified: Stats. of 1883, No. 306, sec. 1. In Georgia, the code, section 2638, says: "A contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party." In two states, notes, bills, bonds, judgments, mortgages, and other securities are expressly made void when the consideration is for money or property lost by reason of the prohibited contracts: Illinois (Rev. Stats. of 1883, c. 38, sec. 131; Crim. Code, sec. 131); South Carolina (Stats. of 1883, No. 306, sec. 5); and in Illinois no assignment thereof affects the defense of the person giving, granting, drawing, entering into, or executing such securities, or the remedies of any person interested therein: Sec. 136.

A few decisions have interpreted the foregoing statutory provisions. Thus it is held that the Arkansas act was not intended to prohibit contracts for future delivery, entered into in good faith, with an actual intention of fulfillment, but speculation upon chances where no delivery is contemplated, but the parties expect to settle differences: *Fortenbury v. State*, 1 S. W. Rep. 58 (Ark.). But contracts purporting on their face to be contracts of purchase or sale of grain, stocks, or other property, to be delivered at a future day, but under which neither of the parties intends to buy or sell, but both intend at the time of making the contracts to close them by a settlement of differences merely, are gambling or wagering contracts, and illegal both by statute of Tennessee and by public policy: *Dunn v. Bell*, 4 Id. 41 (Tenn.). So in Georgia, in the language of the code, a contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party: *Warren v. Hewitt*, 45 Ga. 501; *Branch v. Palmer*, 65 Id. 210; *Thompson v. Cummings*, 68 Id. 124; *Porter v. Massengale*, 68 Id. 296. In Illinois, it will be noticed, the statute prohibits options "to sell or buy." It is therefore the accepted doctrine that "puts," or privileges of delivering or not delivering the thing sold, and "calls," or privileges of calling for or not calling for the thing bought, are the only objectionable contracts within its terms: *Pickering v. Cease*, 79 Ill. 328, 330; *Pixley v. Boynton*, 79 Id. 351, 353; *Logan v. Musick*, 81 Id. 415; *Pearce v. Foote*, 113 Id. 228, 234; 55 Am. Rep. 414; 416; *Tenney v. Foote*, 4 Ill. App. 594, 598, affirmed in 95 Ill. 99, 109; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Id. 467; *Colderwood v. McCrea*, 11 Id. 543; *Coffman v. Young*, 20 Id. 76; *Miller v. Bensley*, 20 Id. 528; *Gilbert v. Gaugar*, 8 Biss. 214 (C. C., N. D. of Ill.); *Jackson v. Foote*, 11 Id. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.); *Melchers v. American Union Tel. Co.*, 3 McCrary, 521; 11 Fed. Rep. 193 (C. C.,

D. of Iowa, decided under the Illinois statute); although such contracts might be void, as wagering contracts, at the common law: See *Pickering v. Cease*, 79 Ill. 328; *Beveridge v. Hewitt*, 8 Ill. App. 467. "Time" contracts, or those where the thing is to be delivered, but an option is given the seller or buyer as to the time of delivery or receipt, within a limited period in the future, are not prohibited: *Walcott v. Heath*, 78 Ill. 433; *Pickering v. Cease*, 79 Id. 328, 330; *Hixley v. Boynton*, 79 Id. 351, 353; *Logan v. Musick*, 81 Id. 415; *Corbett v. Underwood*, 83 Id. 324, 330; 25 Am. Rep. 392, 397; *Cole v. Milmine*, 88 Id. 349; *Tenney v. Foote*, 4 Ill. App. 594, 598, affirmed in 95 Ill. 99, 109; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Id. 467; *Colderwood v. McCrea*, 11 Id. 543; *Miller v. Bensley*, 20 Id. 528; *Gilbert v. Gaugar*, 8 Biss. 214 (C. C., N. D. of Ill.); although if the parties do not intend a delivery, but simply contemplate a settlement of differences, such contracts will nevertheless be void, at the common law, as wagering or gaming contracts: *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.).

There has been considerable discussion as to whether, in the absence of special statutes, contracts of sale for future delivery, where no actual delivery was contemplated by the parties, but only a settlement of the difference between the contract price and the market price at the time appointed for delivery intended, fell within the general statutes as to gaming and wagering. This question has arisen in some cases from the English theory that such contracts were not illegal at the common law: *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *Thacker v. Hardy*, L. R. 4 Q. B. D. 685; *Irvine v. Williar*, 110 U. S. 499, 510; and in other cases from the fact that by certain statutes negotiable paper, given on a gaming or wagering consideration, is invalidated in the hands of *bona fide* indorsees, for value, without notice, and before maturity. By the statute 8 & 9 Vict., c. 109, sec. 18, "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made"; and it is held that a colorable contract for the purchase and sale of railway shares, where neither party intends to deliver or accept the shares, but merely to pay differences, according to the rise or fall of the market, is gaming and wagering within the statute: *Grisewood v. Blane*, 11 Com. B. 536; *Barry v. Croskey*, 2 Johns. & H. 1; and of course this doctrine is general: See 2 Addison on Contracts, Abbott's ed., *1157; Benjamin on Sales, Bennett's 4th ed., sec. 542. A similar view has been taken by a few cases in this country, in which it has been held that such contracts were within the acts to prevent gaming and wagering, or at least were opposed to the public policy thereby established: *Cassard v. Hinman*, 1 Bosw. 207; *Bigelow v. Benedict*, 70 N. Y. 202, 206; 26 Am. Rep. 573, 576; *Barnard v. Backhaus*, 52 Wis. 593, 599, approved in *Everingham v. Meighan*, 55 Id. 354; *Lowry v. Dillman*, 59 Id. 197; *Wall v. Schneider*, 59 Id. 352, 354; 48 Am. Rep. 520, 521; *In re Green*, 7 Biss. 338, 339; 15 Nat. Bank. Reg. 198 (D. C., W. D. of Wis.); *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *In re Hunt*, 26 Fed. Rep. 739 (D. C., D. of N. J.); *McGrew v. City Produce Exchange*, 4 S. W. Rep. 38 (Tenn.); *Dunn v. Bell*, 4 Id. 41, 44 (Tenn.); but it must be admitted that a considerable straining of language is generally required to reach this result. It has also been held that a promissory note, the consideration of which grows out of a speculating transaction, is void in the hands of a *bona fide* indorsee,

for value, without notice, and before maturity, under a general statutory provision that all evidences of debt, "executed upon a gaming consideration," are void in the hands of any person: *Cunningham v. National Bank of Augusta*, 71 Ga. 400; 51 Am. Rep. 266; see also *Hawley v. Bibb*, 69 Ala. 52; *Barnard v. Backhaus*, 52 Wis. 593; but other cases, with more reason, reach the opposite conclusion under similar statutes, although recognizing that on general considerations of public policy the notes could not be enforced between the immediate parties: The principal case; *Third National Bank v. Tinsley*, 11 Mo. App. 498; *Third National Bank v. Harrison*, 3 McCrary, 316; 10 Fed. Rep. 243 (D. C., E. D. of Mo.); *Third National Bank v. Tinsley*, MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249; in Michigan *bona fide* holders, without notice, are expressly excepted: *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474.

VENDOR NEED NOT OWN PROPERTY. — It is a well-settled rule that a contract for the sale of personal property to be delivered in the future is not invalid merely because the vendor, at the time the contract was made, has not the property, nor has entered into any contract to buy it, nor has any other means of getting it than to go into the market and buy it: Benjamin on Sales, Bennett's 4th ed., sec. 542; Newmark on Sales, sec. 369; 2 Addison on Contracts, Abbott's ed., *1157; Bishop on Contracts, sec. 534; 1 Wharton on Contracts, sec. 453; Biddle on Stockbrokers, 185, 302, 309; Dos Passos on Stockbrokers, 410, 452; note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 258, by Judge Bennett; *Hibblewhite v. McMorine*, 5 Mees. & W. 462; *Mortimer v. McCallan*, 6 Id. 58; *Porter v. Viets*, 1 Biss. 177; *Clarke v. Foss*, 7 Id. 540; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521, 524; 11 Fed. Rep. 193, 195, and note, pages 536 and 204, respectively, by Dr. Francis Wharton; *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263; *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Irwin v. Williar*, 110 U. S. 499; *Hawley v. Bibb*, 69 Ala. 52; *Hatch v. Douglas*, 48 Conn. 116, 127; 40 Am. Rep. 154, 155; *Whitesides v. Hunt*, 97 Ind. 191, 195, 202; 49 Am. Rep. 441, 444, 448; *Sawyer v. Taggart*, 14 Bush, 727, 733; 18 Am. Law Reg., N. S., 222, 224, and note, page 230, by Charles H. Wood; *Beadles v. McElrath*, 3 S. W. Rep. 152, 154 (Ky.); *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Rumsey v. Berry*, 65 Me. 570, 573; *Gregory v. Wendell*, 39 Mich. 337, 340; 33 Am. Rep. 390, 392; *Gregory v. Wendell*, 40 Mich. 432; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510, 519; the principal case; *Williams v. Tiedemann*, 6 Mo. App. 269; *Kent v. Miltenberger*, 13 Id. 503; *Stanton v. Small*, 3 Sand. 230; *Cassard v. Hinman*, 1 Bosw. 207; *McIlwaine v. Egerton*, 2 Robt. 422; *Tyler v. Barrows*, 6 Id. 104; *Peabody v. Speyers*, 56 N. Y. 230, 234; *Bigelow v. Benedict*, 70 Id. 202, 206; 26 Am. Rep. 573, 576; *Manton v. Gheen*, 75 Pa. St. 166, 168; *Marshall v. Thruston*, 3 Lea, 740; *Seeliger v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593, 596; *Barnard v. Backhaus*, 52 Wis. 593, 597, 599; *Wall v. Schneider*, 59 Id. 352, 354; 48 Am. Rep. 520, 521. The contrary doctrine announced in *Lorymer v. Smith*, 1 Barn. & C. 1, and *Bryan v. Lewis*, Ryan & M. 386, was overruled in the leading case of *Hibblewhite v. McMorine*, *supra*. It may be stated that such future contracts may be made for the sale of gold: *Appleman v. Fisher*, 34 Md. 540; *Peabody v. Speyers*, 56 N. Y. 230, 234; *Bigelow v. Benedict*, 9 Hun, 429, 432, affirmed in 70 N. Y. 202; 26 Am. Rep. 573; *Brown v. Speyers*, 20 Gratt. 296; a contract for the purchase or sale of gold not being opposed to public policy.

In *Gregory v. Wendell*, 39 Mich. 337, 340, 33 Am. Rep. 390, 392, Marston, J., says: "Some nice distinctions have heretofore been drawn as to the right of

a person to sell personal property not at the time owned by him, but which he intended to go into the market and buy, or as was said, that which he hath neither actually nor potentially. Courts must, however, from necessity, recognize the methods of conducting and carrying on business at the present day, and applying well-settled principles of the common law, enforce what might be called a new class or kind of agreements, heretofore unknown, unless they violate some rule of public policy. The mercantile business of the present day could no longer be successfully carried on, if merchants and dealers were unable to purchase or sell that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by delivery of warehouse receipts, according to custom, is also beyond dispute." "Present ownership is of less consequence than the intention of the contracting parties": *Cockrell v. Thompson*, 85 Mo. 510, 519. The fact that the particular goods are not identified is of no consequence, because, from the very nature of the contract, the sale is not of ascertained articles, but of articles of a designated kind to be selected at the time of performance, and may be discharged by the delivery of any articles answering to the general description given in the contract: *Sawyer v. Taggart*, 14 Bush, 727, 736; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 526. A note payable in the future in cotton is not illegal because the maker did not at the time have the cotton on hand ready to be delivered: *Phillips v. Ocmulgee Mills*, 55 Ga. 633. "Such a principle would make illegal every loan of corn by one neighbor to another, to be returned at the end of the season when the new crop came in": *Id.* Of course, if one has the property under his control, as a growing crop, he has the right to sell it, to be delivered at a future time: *Sanborn v. Benedict*, 78 Ill. 309; and, necessarily, a contract for the sale and transfer at a future day of a certain number of shares of stock which the vendor has at the time of delivery, and of which an actual transfer is intended, is not a stock-jobbing or wagering contract: *Noyes v. Spaulding*, 27 Vt. 420.

WAGERING CONTRACTS FOR SALE ARE VOID. — While it is thus seen that a contract for the sale of personal property, to be delivered in the future, may be valid, although the vendor has not the property at the time the contract is made, but is obliged to procure it to meet the contract, yet such a contract is only valid where the parties really intend that the property is to be delivered by the seller, and the price paid by the buyer. If the intent of the parties be merely to speculate in the rise and fall of prices, and the property is not to be delivered, but one party is to pay to the other the difference between the contract price and the market price at the time specified for executing the contract, then the transaction, whatever be its form, is a wager, and void. It has been shown above that this is the conclusion reached by *Grizewood v. Blane*, 11 Com. B. 536, and other cases under the gaming act of 8 & 9 Vict., c. 109, sec. 18, such contracts not being obnoxious to the common law of England; and that several courts of this country, in states which have not adopted the special statutes already noticed invalidating these transactions, have also been disposed to adopt the rule as a result of general acts against gaming and wagering. But in a great majority of the states the rule is adopted as a part of the American common law, and the contracts pronounced void as wagering or gambling transactions for

reasons of public policy: Benjamin on Sales, Bennett's 4th ed., American note to sec. 542; Newmark on Sales, sec. 369; Bishop on Contracts, sec. 534; 1 Wharton on Contracts, sec. 453; Biddle on Stockbrokers, 313; Dos Passos on Stockbrokers, 410; *In re Chandler*, 13 Am. Law Reg., N. S., 310; 9 Nat. Bank. Reg. 514; *sub nom. Ex parte Young*, 6 Biss. 53, and note thereto in 13 Am. Law Reg., N. S., 318, by Judge Redfield; *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37; *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263; *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609, and note thereto in 5 McCrary, 89; 22 Am. Law Reg., N. S., 615, by Adelbert Hamilton; *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825; *Kirkpatrick v. Adams*, 20 Id. 287; *Bangs v. Hornick*, 30 Id. 97, 98; *Mutual Life Ins. Co. v. Watson*, 30 Id. 653; *Ward v. Vosburgh*, 31 Id. 12, 13; *Irwin v. Williar*, 110 U. S. 499; *Justh v. Holliday*, 2 Mackey, 346; *Hawley v. Bibb*, 69 Ala. 52; *Hatch v. Douglas*, 48 Conn. 116, 127; 40 Am. Rep. 154; *Whitesides v. Hunt*, 97 Ind. 191, 195, 202; 49 Am. Rep. 441, 445, 449; *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Lowe v. Young*, 59 Iowa, 364; *First National Bank v. Oskaloosa Packing Co.*, 66 Id. 41; *Tomblin v. Callen*, 69 Id. 229; *Beadles v. McElrath*, 3 S. W. Rep. 152, 154 (Ky.); *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 524; *Rumsey v. Berry*, 65 Me. 570; *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390, 395; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510; the principal case; *Waterman v. Buckland*, 1 Mo. App. 45; *Williams v. Tiedemann*, 6 Id. 269; *Kent v. Millenberger*, 13 Id. 503; *Third National Bank v. Tinsley*, Cir. Ct. of Mo., MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249; *Rudolf v. Winters*, 7 Neb. 125; *Kingsbury v. Kirwan*, 77 N. Y. 612, affirming 11 Jones & S. 451; *Yerkes v. Salomon*, 11 Hun, 471; *Nichols v. Lumpkin*, 19 Jones & S. 88; *Brua's Appeal*, 55 Pa. St. 294; *Swart's Appeal*, 3 Brewst. 131; *Thompson's Estate*, 15 Phila. 532; *Maxton v. Gheen*, 75 Pa. St. 166, 168; *North v. Phillips*, 89 Id. 250, 256; *Ruchizky v. De Haven*, 97 Id. 202, 209; *Griffiths v. Sears*, 112 Id. 523; *Waugh v. Beck*, 114 Id. 422; *Marshall v. Thruston*, 3 Lea, 740; *Beadles v. Ownby*, 16 Id. 424; *Dunn v. Bell*, 4 S. W. Rep. 41 (Tenn.); *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593, 596. Of course an agreement to make a "corner" in stock, by buying it up so as to control the market, and then purchasing for future deliveries, would be invalid: *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327.

The doctrine is well stated by Franklin, C., after a review of cases, in *Whitesides v. Hunt*, 97 Ind. 191, 202, 49 Am. Rep. 441, 448: "We conclude from the foregoing authorities that in this class of cases the correct rule is, that where a commodity is bought for future delivery, no matter what the form of the contract is, the law regards the substance, and not the shadow, and if the parties mutually understood and intended that the purchaser should pay for and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin, and increase the same, like the purchaser, in order to secure the delivery at maturity, does not vitiate the contract. But if, at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for nor to be delivered, but that the contract was to be settled and adjusted by the payment of difference in price, — if the price should decline the purchaser paying the difference, if it should rise the seller paying the advance, the contract price being the basis upon which to

calculate differences, — in such case, it would be a gambling contract, and void, and the deposits of margins are only to be considered as attempting to secure the terms of the bet on prices at some future time."

If "margins" are deposited upon such an illegal transaction, they cannot be recovered back: *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390; *Thompson v. Cummings*, 68 Ga. 124; compare *In re Chandler*, 13 Am. Law Reg., N. S., 310; 2 Nat. Bank. Reg. 514; *sub nom. Ex parte Young*, 6 Biss. 53; but in *Norton v. Blinn*, 39 Ohio St. 145, it was decided that while the policy of the law is to leave the parties to such a transaction where it finds them, yet an agent who receives money of his principal to invest in illegal options was bound to account therefor.

Money loaned to pay losses incurred in stock-jobbing transactions, it has been held, could be recovered back: *Faikney v. Reynous*, 1 W. Black. 633; 4 Burr. 2069; *Petrie v. Hannay*, 3 Term Rep. 418; *Steers v. Lashley*, 6 Id. 61, 62; but it was more recently decided that if the money be knowingly lent for the express purpose of enabling the borrower to settle such losses, it cannot be so recovered: *Cannan v. Bryce*, 3 Barn. & Ald. 179, 185; and one who, knowingly, and with the purpose of furthering a gambling transaction in purchasing commodities on margin, lends money to another, cannot recover it; but it is not enough to defeat the recovery that the lender knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction: *Waugh v. Beck*, 114 Pa. St. 422.

A promissory note given for a debt arising in whole or in part out of an illegal transaction is, as between the parties, void: *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593; and where some of the transactions which enter into the consideration of a note and mortgage are merely gaming transactions, they render the whole security void: *Barnard v. Backhaus*, 52 Wis. 593. Nor can negotiable paper tainted with the illegality be recovered upon by an indorsee thereof with notice: *Steers v. Lashley*, 6 Term Rep. 61; nor when the paper was indorsed after maturity: *Brown v. Turner*, 7 Id. 630; and of course the assignee of a bond who takes with notice cannot recover: *Amory v. Meryweather*, 4 Dowl. & R. 86; 2 Barn. & C. 573; *Griffiths v. Sears*, 112 Pa. St. 523; but negotiable paper which could not be enforced between the immediate parties because of illegality is good in the hands of a *bona fide* indorsee, without notice, for value, and before maturity: *Greenland v. Dyer*, 2 Man. & R. 422; *Day v. Stuart*, 6 Bing. 109; 3 Moore & P. 334; the principal case; *Third National Bank v. Tinsley*, 11 Mo. App. 498; *Third National Bank v. Harrison*, 3 McCrary, 316; 10 Fed. Rep. 243 (D. C., E. D. of Mo.); *Third National Bank v. Tinsley*, MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249 (Mo. Cir. Ct.); *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474; unless, as in Illinois, it is expressly made void by statute: *Root v. Merriam*, 27 Fed. Rep. 909 (C. C., D. of Neb., decided under the Illinois statute); *Tenney v. Foote*, 4 Ill. App. 594, affirmed in 95 Ill. 99; compare *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.); or held to be void under general statutes against gaming and wagering: *Cunningham v. National Bank of Augusta*, 71 Ga. 400; 51 Am. Rep. 286; *Hawley v. Bibb*, 69 Ala. 52; *Barnard v. Backhaus*, 52 Wis. 593.

INTENTION OF PARTIES THE CRITERION. — As above intimated, it is the real intention of the parties to a contract for sale for future delivery which makes it valid or invalid: Note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 259, by Judge Bennett; *Hents v. Jewell*, 4 Woods, 656; 20 Fed. Rep. 592; *Bennett v. Covington*, 22 Id. 816; *Justh v. Holliday*, 2 Mackey, 346;

Gregory v. Wendell, 39 Mich. 337, 343; 33 Am. Rep. 390, 395; 40 Mich. 432. "The real intention of the parties," says Adama, C. J., in *Tomblin v. Callen*, 69 Iowa, 229, 231, "of course, must determine the character of the transaction; and in arriving at the intention, we must be governed by the evidence, and not by conjectures based upon our knowledge of other contracts." "The actual intention may be difficult to prove or disprove; but when once the fact is established one way or the other, there is no difficulty in applying the law": *Hatch v. Douglas*, 48 Conn. 116, 127; 40 Am. Rep. 154, 155.

In order, moreover, to render the contract invalid, the illegal intent must have been participated in by both the parties. If one of the parties intends an actual purchase and sale, the contract as to him will not be affected by an illegal intent or purpose of the other not communicated or concurred in: Newmark on Sales, sec. 369; Benjamin on Sales, Bennett's 4th ed., American note to sec. 542; 1 Wharton on Contracts, sec. 453; note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 259, by Judge Bennett; *Lehman v. Strassberger*, 2 Woods, 554, 564; *Clarke v. Foss*, 7 Biss. 540; *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263; *Bangs v. Hornick*, 30 Fed. Rep. 97, 98; *Ward v. Vosburgh*, 31 Id. 12, 13; *Pixley v. Boynton*, 79 Ill. 351, 354; *McCormick v. Nichols*, 19 Ill. App. 334; *Whitesides v. Hunt*, 97 Ind. 191, 210; *Murry v. Ocheltree*, 59 Iowa, 435; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Gregory v. Wendell*, 40 Mich. 432; *Clay v. Allen*, 63 Miss. 426, 430; *Cockrell v. Thompson*, 85 Mo. 510; the principal case; *Williams v. Tiedemann*, 6 Mo. App. 269; *Teasdale v. McPike*, 25 Id. 341; *Williams v. Carr*, 80 N. C. 294, 298; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520. "If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property which is the subject of the sale, the transaction as to him will be valid, and will be a sufficient consideration for a contract in his hands based thereon": *Murry v. Ocheltree*, *supra*. "In order to make a wager, both parties must intend it to be such. If one intends a *bona fide* sale or purchase, while the other means only a gambling risk upon prospective differences, there will be no propriety in depriving the former of the benefit of his contract because of a secret reservation in the mind of the latter": *Williams v. Tiedemann*, *supra*. But the effect of the Tennessee act of 1883, chapter 251, is to declare the dealing in futures, where either party intends a mere speculation on the rise and fall of prices, gaming: *McGrew v. City Produce Exchange*, 4 S. W. Rep. 38 (Tenn.).

The validity of the contract, furthermore, depends upon the intent of the parties at the time it is made. It is therefore perfectly competent for the parties, after having entered into a valid contract for sale for future delivery, to agree upon a settlement thereof by payment of differences between the contract price and the market price, instead of by actual delivery: Newmark on Sales, sec. 369; *Clarke v. Foss*, 7 Biss. 540; *Gilbert v. Gaugar*, 8 Id. 214; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Ward v. Vosburgh*, 31 Id. 12, 13, 15; *Sawyer v. Taggart*, 14 Bush, 727; 18 Am. Law Reg., N. S., 222; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Kent v. Miltenberger*, 13 Mo. App. 503, 508, 510; *Wall v. Schneider*, 59 Wis. 352, 359; 48 Am. Rep. 520, 526; for, as is tersely observed by Thompson, J., in *Kent v. Miltenberger*, *supra*, "it has never been held that a lawful contract may not be discharged by the voluntary act of the obligee in accepting a pecuniary equivalent for its performance." And if delivery is in fact intended, the contract is valid, it is held, although the parties may at the same time contemplate the possibility of a settlement by a payment of differences: *Tomblin v. Callen*, 69 Iowa, 227. It may here be noticed that parties, after having

made an illegal contract, are at liberty to enter into another contract in relation to the same subject-matter as though no former contract existed, but the new contract must be in no sense a continuation of the old; the old contract must be utterly abandoned, so that neither its terms nor its consideration, nor any claim or right springing out of it, shall enter into the new: *Weber v. Sturges*, 7 Ill. App. 560.

The fact that speculation was the object is not material, if the parties in good faith intend an actual purchase and sale: *Gregory v. Wendell*, 40 Mich. 432, 437; *Sawyer v. Taggart*, 14 Bush, 727; 18 Am. Law Reg., N. S., 222; *Smith v. Bouvier*, 70 Pa. St. 325. "The right to buy grain in the open market in the hope to profit by a rise in the market value," says Cooley, J., in *Gregory v. Wendell*, *supra*, "is as plain as the right to buy wild lands or any other property."

The question whether the contract is a wagering one or not is a question of fact for the jury: *Ferreira v. Gabell*, 89 Pa. St. 89; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Gregory v. Wendell*, 39 Mich. 337, 343; 33 Am. Rep. 390, 395; 40 Mich. 432.

FORM OF CONTRACT DOES NOT CONTROL.—As observed above, the intent of the parties controls. The form of the contract is consequently not conclusive as to the true nature of the transaction, nor, indeed, should much stress be placed thereon: *In re Green*, 7 Biss. 338, 339; 15 Nat. Bank. Reg. 198; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521, 526; 11 Fed. Rep. 193, 196; *Bartlett v. Smith*, 4 Id. 388, 395; 13 Fed. Rep. 263, 268; *Just v. Holaday*, 2 Mackey, 346; *Tenny v. Foote*, 4 Ill. App. 594, 599, affirmed in 95 Ill. 99, 109; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Colderwood v. McCrea*, 11 Id. 543; *Coffman v. Young*, 20 Id. 76; *Whitesides v. Hunt*, 97 Ind. 191, 202; 49 Am. Rep. 441, 448; *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390, 395; *Barnard v. Backhaus*, 52 Wis. 593, 600; *Fortenbury v. State*, 1 S. W. Rep. 58 (Ark.). "It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intention, and the real nature of the transaction, if it be illegal": *Barnard v. Backhaus*, *supra*, per Cole, C. J.

A sale "short," or in other words, a sale of that which the seller does not own or possess, but which he expects to buy in at a lower price than that for which he sells, is not *ipso facto* a wager: Note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 259, by Judge Bennett; *Maxton v. Gheen*, 75 Pa. St. 166, 168; and see the authorities cited *supra*, "Vendor need not Own Property." Nor does the fact that one of the parties, generally the vendor, is given an option as to the time of delivery, render the transaction objectionable: Note to *Sawyer v. Taggart*, 18 Am. Law Reg., N. S., 230, by Charles H. Wood; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521, 524; 11 Fed. Rep. 193, 195; *Union National Bank v. Carr*, 5 McCrary, 71; 15 Fed. Rep. 438; *Gregory v. Wattowa*, 58 Iowa, 711, 713; *Williams v. Tiedemann*, 6 Mo. App. 269, 273; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520. "The option as to the time of delivery of merchandise purchased is not illegal, if there be an agreement to make actual delivery. The optional contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered": *Gregory v. Wattowa*, *supra*. These "time" contracts, where a delivery is actually contemplated, are not, as seen above, within the Illinois statute prohibiting "options to sell or buy": *Wolcott v. Heath*, 78 Ill. 433; *Pickering v. Cease*, 79 Id. 328, 330; *Pisley v. Boynton*, 79 Id. 351, 353; *Logan v. Musick*, 81 Id. 415;

Corbett v. Underwood, 83 Ill. 324, 330; 25 Am. Rep. 392, 397; *Cole v. Milmine*, 88 Id. 349; *Tenney v. Foote*, 4 Ill. App. 594, 598, affirmed in 95 Ill. 99, 109; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Id. 467; *Colderwood v. McCrea*, 11 Id. 543; *Miller v. Bensley*, 20 Id. 528; *Gilbert v. Gaugar*, 8 Biss. 214 (C. C., N. D. of Ill.); although in Illinois, as elsewhere, if the parties do not intend a delivery, but simply contemplate a settlement of differences, such contracts are void as wagering or gaming contracts: *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.). "Put," or privileges on the part of sellers of delivering or not delivering, and "call," or privileges of buyers of calling or not calling for the thing sold, at their option, are not necessarily invalid: Note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 258; *In re Chandler*, 13 Id. 310, 316; 9 Nat. Bank. Reg. 514, 521; *sub nom. Ex parte Young*, 6 Biss. 53, 66; *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573; *Williams v. Tiedemann*, 6 Mo. App. 269, 274; although it seems they would be under the statute of Illinois; but see *In re Chandler, supra*. "That there is an element of hazard in the contract is plain. But the same hazard is incurred in every optional contract for the sale of any marketable commodity, when, for a consideration paid, one of the parties binds himself to sell or receive the property at a future time, at a specified price, at the election of the other. Mercantile contracts of this character are not infrequent, and they are consistent with a *bona fide* intention on the part of both parties to perform them": *Bigelow v. Benedict, supra*. And a "straddle," even, or the double privilege of a "put" and a "call," securing to the holder the right to buy of or sell to another something within a certain time, at a certain price, is not necessarily void: *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398; *Story v. Salomon*, 71 N. Y. 420, affirming 6 Daly, 531. "We may guess that the parties were speculating upon the fluctuations in the price of the stock, and that the defendant was not required to take or deliver any stock in any case, but simply to pay differences. But a contract which can have legal interpretation and effect should not be condemned without any proof, in that way": *Story v. Salomon, supra*. But in *Kirkpatrick v. Bonsall*, 72 Pa. St. 155, 158, Agnew, J., gives the following observations, which may appropriately apply to all these optional contracts, although referring to but one kind: "It is evident such agreements can be readily prostituted to the worst kind of gambling ventures, and therefore its character may be weighed by a jury, in connection with other facts, in considering whether the bargain was a mere scheme to gamble upon the chance of prices. The form of the venture, when aided by evidence, may clearly indicate a purpose to wager upon a rise or fall in the price of oil at a future day, and not to deal in the article as men usually do in that business. We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed 'speculation.'"

The mere fact, furthermore, that a margin is required to be deposited as security does not make the contract illegal: *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520; *Whitesides v. Hunt*, 97 Ind. 191, 202; 49 Am. Rep. 441, 448; *Earl v. Howell*, 14 Abb. N. C. 474, 476; *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154; nor that delivery is to be made in warehouse receipts: *Wall v. Schneider, supra*; *Gregory v. Wendell*, 39 Mich. 337, 340; 33 Am. Rep. 390, 392; nor because the contract provides that the measure of damages in case of a breach shall be the difference between the contract price and the market price on the chamber of commerce where the contract is made: *Wall v. Schneider, supra*.

EVIDENCE OF ILLEGALITY — BURDEN OF PROOF. — There is no doubt that although a contract is regular and legal on its face, it is competent to show that it was intended as a mere gambling transaction: *Clarke v. Foss*, 7 Biss. 540, 551; *Stewart v. Schall*, 65 Md. 289; 57 Am. Rep. 327; *Kent v. Miltenberger*, 13 Mo. App. 503; *Beadles v. McElrath*, 3 S. W. Rep. 152 (Ky.); contra: *Porter v. Viets*, 1 Biss. 177; and in order to ascertain the intention of the parties, it may be shown how they were in the habit of dealing together in respect to like transactions prior to the one in controversy: *Colderwood v. McCrea*, 11 Ill. App. 543; but the illegality of a contract cannot be established by proving the usual custom of persons making such contracts, or a general expectation or understanding that such contracts were to be settled without an actual delivery: *Bennett v. Covington*, 22 Fed. Rep. 816. But contracts for future delivery are presumptively valid: Note to *Cobb v. Prell*, 5 McCrary, 90; 22 Am. Law Reg., N. S., 617; *Kent v. Miltenberger*, 13 Mo. App. 503; *Beadles v. McElrath*, 3 S. W. Rep. 152 (Ky.); compare *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; and "in construing a contract, that construction is to be preferred which will support it, rather than one which will avoid it": *Bigelow v. Benedict*, 70 N. Y. 202, 204; 26 Am. Rep. 573, 575; *Clay v. Allen*, 63 Miss. 426. The burden of proof of establishing the illegality rests therefore upon the party who asserts it: *Newmark on Sales*, sec. 369; *Clarke v. Foss*, 7 Biss. 540, 550; *Bennett v. Covington*, 22 Fed. Rep. 816; *Bangs v. Hornick*, 30 Id. 97, 99; *Ward v. Vosburgh*, 31 Id. 12; *Pizley v. Boynton*, 79 Ill. 351, 352; *Whitesides v. Hunt*, 97 Ind. 191, 210; *Gregory v. Wattowa*, 58 Iowa, 711; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Id. 41, 46; *Beadles v. McElrath*, 3 S. W. Rep. 152 (Ky.); *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Rumsey v. Berry*, 65 Me. 570; *Wyman v. Fiske*, 3 Allen, 238; *Clay v. Allen*, 63 Miss. 426; the principal case; *Williams v. Tiedemann*, 6 Mo. App. 269; *Kent v. Miltenberger*, 13 Id. 503; *Teasdale v. McPike*, 25 Id. 341; *McIlvaine v. Egerton*, 2 Robt. 422; *Dykens v. Townsend*, 24 N. Y. 57; *Bigelow v. Benedict*, 70 Id. 202, 206, 207; 26 Am. Rep. 573, 576, 577; *Williams v. Carr*, 80 N. C. 294, 298, although there are some expressions to the contrary: *Barnard v. Backhaus*, 52 Wis. 593, 599; *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609; *Stebbins v. Leonolf*, 3 Cush. 137; and see *First Nat. Bank v. Oskaloosa Packing Co.*, *supra*. "We cannot assume," says Danforth, J., in *Rumsey v. Berry*, *supra*, "that any one has violated the law, and been guilty of immoral and corrupting practices in his business transactions, without proof, even though he may ask it himself for the purpose of being relieved from the obligation of a losing contract." Yet, upon the well-settled doctrine concerning negotiable instruments, if the illegality in the inception of a promissory note be shown by the maker in an action against him thereon by an indorsee, the burden is on the plaintiff to show that he acquired the paper in good faith, for value, in the usual course of business, and before maturity: *Third Nat. Bank v. Tinsley*, 11 Mo. App. 498, 502.

BROKER'S RIGHT TO COMMISSIONS AND ADVANCES. — The right of a broker who negotiates a contract for future delivery to recover commissions and advances from his principal is of course unquestionable if the contract is held to be valid: See *Roundtree v. Smith*, 108 U. S. 269; *Whitesides v. Hunt*, 97 Ind. 191, 203; *Teasdale v. McPike*, 25 Mo. App. 341; *Smith v. Bowrier*, 70 Pa. St. 325; *Maxton v. Gheen*, 45 Id. 166; *Powell v. McCord*, 12 N. E. Rep. 262 (Ill.). But there is considerable difficulty and conflict of decision where the contract negotiated is invalid. In England it is well settled that neither the statute 7 Geo. II., c. 8, nor the statute 7 & 8 Vict., c. 109, sec. 18, heretofore

referred to, applies to claims by a stock-broker or share-broker against his principal so as to defeat his recovery: 2 Addison on Contracts, Abbott's ed., *1157; *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *Jessopp v. Lutwyche*, 10 Ex. 614; *Knight v. Cambers*, 15 Com. B. 562; *Knight v. Fitch*, 15 Id. 566; *Ashton v. Dakin*, 4 Hurl. & N. 869; *Rosewarne v. Billing*, 15 Com. B., N. S., 316; *Thacker v. Hardy*, L. R. 4 Q. B. D. 685; *Cooper v. Neil*, 27 Week. Rep. 159, note; and to the same effect, under the stock-jobbing act of Massachusetts, see *Wyman v. Fiske*, 3 Allen, 238; *Durant v. Bell*, 98 Mass. 161; but see *Stebbins v. Leonwolf*, 3 Cush. 137. In a few cases in this country the broker's right to recover has turned upon the fact that the principal subsequently executed his note to the broker for advances and commissions in the illegal transaction: *Lehman v. Strassberger*, 2 Woods, 554 (C. C., N. D. of Ala.); *Hents v. Jewell*, 4 Id. 656; 20 Fed. Rep. 592 (C. C., S. D. of Miss.); and see *Clarke v. Foss*, 7 Biss. 540, 553 (D. C., W. D. of Wis.); *Hawley v. Bibb*, 69 Ala. 52. "The contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract": *Lehman v. Strassberger*, *supra*; but see the language in *Seeligson v. Lewis*, 65 Tex. 215, 222; 57 Am. Rep. 593, 599. So in Georgia it is held that where the contract is executed, an agent or broker employed by the principal to make it can recover any money advanced in the transaction by the previous authority or subsequent ratification of the principal: *Warren v. Hewitt*, 45 Ga. 501; *Heard v. Russell*, 59 Id. 25; *Champion v. Wilson*, 64 Id. 184, 188; *Thompson v. Cummings*, 68 Id. 124; and this ruling has been approved in *Williams v. Carr*, 80 N. C. 294; but in *Cunningham v. National Bank of Augusta*, 71 Ga. 400, 405, 51 Am. Rep. 266, 269, the court "are not prepared to say that we will be bound in the future by the decisions last referred to." On the other hand, in Wisconsin and New Jersey, the right of a broker to recover for advances made and services rendered concerning a gambling transaction is stringently denied: *In re Green*, 7 Biss. 338; 15 Nat. Bank. Reg. 198 (D. C., W. D. of Wis.); *Barnard v. Backhaus*, 52 Wis. 593; *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *In re Hunt*, 26 Fed. Rep. 739 (D. C., D. of N. J.); upon the ground that contracts for sale for future delivery, where the parties contemplate simply a settlement of differences, are, under the general statutes relating to gaming and wagering, not simply void, but illegal, and the collateral contracts between brokers and principals are consequently affected. In New Jersey the further reason is given that one who enters into such a speculative contract with a broker is to be considered as dealing with him as a principal, and not as an agent; and this view is supported by certain other, principally Pennsylvania, cases: *North v. Phillips*, 89 Pa. St. 250; *Ruchisky v. De Haven*, 97 Id. 202; *Dickson's Est'r v. Thomas*, 97 Id. 278; *Justh v. Holliday*, 2 Mackey, 346; but compare *Smith v. Bouvier*, 70 Pa. St. 325; *Maxton v. Gheen*, 75 Id. 166; *Fareira v. Gabell*, 89 Id. 89; but these Pennsylvania cases are much criticised: Dos Passos on Stockbrokers, 423-434; Biddle on Stockbrokers, 305, 317. In Illinois, also, a broker who deals for his principal in contravention of section 130 of the Criminal Code cannot recover his disbursements or commissions: *Coffman v. Young*, 20 Ill. App. 76; *Tenney v. Foote*, 4 Id. 594, affirmed in 95 Ill. 90; *Pearce v. Foote*, 113 Id. 228; 55 Am. Rep. 414; compare *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.); and the broker is a "winner" within the meaning of section 132 of the same code, which permits an action to recover back from the winner any money or property paid on account of a gambling transaction: *Pearce v. Foote*, *supra*; *McCormick v. Nichols*, 19 Ill. App. 334, 339.

The most satisfactory doctrine on this question, however, and the one

which best accords with principle, and is sustained by the weight of authority, in the absence of some such statute as that of Illinois, is that announced by Mr. Justice Matthews, in *Irwin v. Williar*, 110 U. S. 499, 510. "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." See also *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263 (C. C., D. of Minn.); *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609 (C. C., D. of Kan.); *Kirkpatrick v. Adams*, 20 Fed. Rep. 287 (C. C., W. D. of Tenn.); *Bangs v. Hornick*, 30 Id. 97 (C. C., D. of Minn.); *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154; *First National Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41, 48; *Stewart v. Schall*, 65 Md. 289; 57 Am. Rep. 327; the principal case; *Crane v. Whittemore*, 4 Mo. App. 510; *Kas v. Millenberger*, 13 Id. 503; *Third National Bank v. Tinsley*, MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249; *Marshall v. Thruston*, 3 Lea, 740; *Beadles v. Ownby*, 16 Id. 424; *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593, 599; *Brown v. Speyers*, 20 Gratt. 296, 309.

If the transaction between broker and principal is a gambling one, it would seem clear that it could not be validated by any form of authorization or ratification: *McCormick v. Nichols*, 19 Ill. App. 334. So where the defendant employed the plaintiff to buy and sell grain for him in form for future delivery, but in fact no grain was intended to be or ever was received or delivered, and a dispute having arisen between the parties as to who should bear the losses incurred in the speculation, and paid by the plaintiff, it was agreed that part of the losses should be borne by the plaintiff, and the balance thereof should be paid to him by the defendant, it was held that there could be no recovery upon such agreement or compromise: *Everingham v. Melghan*, 55 Wis. 354. But where a broker claimed a balance due him by his principal on account of certain stock transactions, and a third party assumed and paid the same, the principal cannot repudiate a note which he executed to the third person therefor, on the ground that the balance claimed by the broker was due on a gambling transaction: *Bangs v. Hornick*, 30 Fed. Rep. 97. Where the transactions between broker and principal are of a gambling nature, the question whether or not third persons dealing with the broker participated in the illegal intention is, it seems, immaterial: *Beveridge v. Hewitt*, 8 Ill. App. 467.

KAES v. GROSS.

[92 MISSOURI, 647.]

PERSON CANNOT LAWFULLY HOLD TWO HOMESTEADS at the same time.

WHEN HOMESTEAD IS ABANDONED, an intention to return, by which the homestead rights are preserved, must be formed at the time of removal. It can have no influence in restoring the right once lost by actual abandonment, until executed by actual resumption of occupancy. A subsequent unexecuted intention to resume possession would not restore the right to hold the homestead exempt.

WHEN HOMESTEAD RIGHT IS LOST BY ABANDONMENT and possession is again resumed, it only gives origin to a new homestead right, dating from the new occupancy, and having no retroactive validity on the old right, and possessing no force against the rights of third persons acquired in the interim between the loss of the old and the acquisition of the new right.

REMOVAL OF FAMILY FROM HOMESTEAD constitutes a *prima facie* case of abandonment, and raises a presumption against the claim of homestead, which must be rebutted before such claim can be successfully asserted.

LENGTH OF TIME THAT CLAIMANT IS ABSENT from homestead constitutes an important factor, in connection with other facts, in determining whether the aggregate result of all the facts is sufficient to establish that a forfeiture of the acquired right has occurred.

PROLONGED ABSENCE FROM HOMESTEAD, like the removal of the family, is sufficient to cast the *onus* of rebutting the presumption of abandonment on the claimant of the homestead.

ABANDONMENT OF HOMESTEAD IS QUESTION OF FACT, each case resting upon its own peculiar circumstances, yet actual removal with no intention to return amounts to a forfeiture of the right as against creditors and purchasers, although no new homestead right is acquired.

REMOVAL FROM HOMESTEAD, coupled with the acquisition of a new home elsewhere, is conclusive proof of abandonment of the old homestead.

WIDOW RESIDING UPON HER HOMESTEAD, who remarries and immediately removes with her children and household goods to the home of her new husband, without expressing an intention of returning to her old homestead, must be considered as abandoning her old homestead.

WIDOW RESIDING ON HOMESTEAD, WHO REMARRIES, is as fully competent to form an intention of abandonment of the homestead as if she remained single, and she is as fully affected by the usual unfavorable presumptions attendant on removal and prolonged absence from her old homestead, and is as much bound to overcome such presumptions, to be successful, as is any other person. The acquisition of a new homestead, at the residence of her second husband, is conclusive proof of her abandonment of the old one.

HUSBAND CANNOT BY DEVISE, or by his sole deed, convey or mortgage the homestead: Mo. R. S., sec. 2689.

WHERE HUSBAND BY WILL DEVISES REAL ESTATE to his wife, which she accepts, it must be taken in lieu of dower out of the lands of which he died seised, unless by his will he otherwise declared.

J. C. Kiskaddon, for the appellants.

T. A. Lowe, for the respondents.

By Court, SHERWOOD, J. The object of this suit is the assertion of a homestead and dower right on the part of Emilie Kaes in certain property in Pacific, Franklin County, Missouri, on the corner of St. Louis Street and Adelaide Avenue, estimated to be worth from four thousand to six thousand dollars.

The petition was filed April 25, 1883, and the trial occurred May 30, 1884. On June 23, 1874, Gustavus Hufschmidt, with his family, lived on the property in question as his homestead. On the date last mentioned, Hufschmidt and his first wife executed and delivered to Franklin County their school mortgage, conveying said property to secure the payment of the sum of about one thousand dollars. His first wife bore him several children, who, with one exception, are still minors. She died, and on the 4th of August, 1875, Hufschmidt married Emilie, the plaintiff, by whom he had two children, one of whom is yet living; they, the children of the first and second marriages, and Hufschmidt and wife, all continued to live at the homestead till September, 1879, when Hufschmidt died, having shortly theretofore made his will, as follows:—

“1. I give and bequeath to my beloved wife, Emilie L. Hufschmidt, the ‘life insurance,’ which I have in the orders of the ‘Odd Fellows’ and ‘Free Masons,’ in the state of Missouri.

“2. I give and bequeath to my beloved wife, E. L. Hufschmidt, the use and income of my house and property on the corner of St. Louis Street and Adelaide Avenue, in the town of Pacific, county of Franklin, and state of Missouri, so long till the youngest of the children of my first wife, Amelia Hufschmidt, deceased, shall become of age, or when the said children of my first wife, deceased, can agree with my beloved wife, Emilie L., to sell the aforesaid property, including the house.

“3. After such sale, the whole amount so realized shall be divided into eight equal shares or parts, so that each of the seven children left by my first wife, deceased, viz., Frank, Emma, Otto, Fritz, Augusta, George, and Alice, and Louisa, the only child with my present wife, shall receive one share or part. Should, however, any of these die before such division is made, without leaving any heir or heirs, then the amount shall be divided into so many shares or parts as are left.

“4. For the use and income of the aforementioned property, house and lot, on St. Louis Street and Adelaide Avenue, Pacific, Missouri, my beloved wife shall pay the interest of my debts, and keep the premises in good order, and raise the minor chil-

children until they become of age; but for this she shall have also the use of all the furniture.

"5. All of my other real estate, consisting of six lots and house, in W. C. Ink's addition to Pacific, and a tract of land of thirteen and twenty-five hundredths acres, between the Missouri Pacific Railroad and Brush Creek, in Keathy's Addition to the town of Pacific, Missouri, my beloved wife shall sell to the best advantage, to settle and pay my contingent debts.

"6. Emilie L. Hufschmidt, appointed sole executrix. Dated July 29, 1879."

This will having been probated, Mrs. Hufschmidt, the executrix, declined in writing, in proper manner, to execute the will, whereupon William Meyersick was granted letters testamentary with the will annexed. From the life insurance policies thus bequeathed her, and rents of the premises, Mrs. Hufschmidt received about four thousand five hundred dollars in cash, and some \$385 worth of household goods and furniture, as well as enjoyed the house rent free, till August 20, 1880, when, wearying of widow's weeds, she married her plaintiff, Phillip Kaes, and on the second day afterwards removed with her family of minor children, and newly wedded *conjux*, to his house in St. Louis County, where she continuously lived up to the time of the trial, having taken with her most of the beds and other furniture, — selling a portion of it, and leaving the rest with an adult son of her husband by his first wife, who had occupied the house with her, and who afterwards sent to his step-mother a portion of the goods thus left in his care.

The testimony of Mrs. Kaes, as to her intention in removing, is expressed in this language: "I did not leave any of the goods there for the purpose or with the intention of returning; had no special intention of returning when I left. I still live in St. Louis County with my husband; do not wish to occupy this property with my husband, and live in it. I can't say that I do intend to return to it, and don't say that I do not; can't say that I would occupy the property should Mr. Gross give me the privilege; I would have to see Mr. Kaes first. I don't want rent; I want Mr. Gross to pay me that what I claim as my homestead. I do not know how much it is; I have not made the calculation."

About four thousand dollars, including the school mortgage debt, was proved and allowed against the estate of Huf-

schmidt, after Meyersick took it in charge; and he, after selling some other lands, obtained a general order for the sale of the land in dispute, as well as two other lots for the payment of debts, and at the first sale, in June, 1881, the property was struck off to Mrs. Kaes for \$1,725; but this sale being disapproved, the administrator sold the property mentioned for \$3,800, in September, 1881, which sale was approved by the court, and a deed was made to defendant Gross, March 10, 1882, who thereupon took possession of the property and leased portions of the same to his co-defendants. Meyersick, the administrator, having paid off the unsecured debts with the money thus realized, satisfied the school mortgage aforesaid, and had it so entered on the record.

At the close of the evidence, the court refused, on the request of plaintiffs, to give a declaration of law in these words:—

“If the court believes, from the evidence, that Gustavus Hufschmidt, in his lifetime, was a housekeeper and head of a family, and that the plaintiff, Emilie Kaes, was his wife, and that, together with their children, they occupied and resided upon the premises described in the petition as being at the corner of St. Louis Street and Adelaide Avenue as their home, and that, while so occupying and residing upon said premises, the said Gustavus Hufschmidt died, then a homestead in said premises, instantly upon the death of said Hufschmidt, vested in the plaintiff for life, and the court will so find; and the defendants have introduced no evidence in this case tending to defeat said claim.”

And gave, at the instance of defendants, the following declaration:—

“Although the court, sitting as a jury, may find from the evidence that Gustavus Hufschmidt was, in his lifetime, a housekeeper and head of a family, and that the plaintiff, Emilie Kaes, was his wife, and that, together with their children, they occupied and resided upon the premises described in the petition as being on the corner of St. Louis Street and Adelaide Avenue as their house, and that, while so occupying and residing upon said premises, the said Gustavus Hufschmidt died, yet, if the court shall further find from the evidence that about the twenty-fifth day of August, 1880, the plaintiff intermarried with one Phillip Kaes, and immediately removed with her said husband to his homestead in St. Louis County, taking with her all her household goods, beds, bed-

ding, and furniture, and that she left said property and home of her former husband with no intention of returning thereto, and ever since she removed to the homestead of her second husband she has continued to reside thereon with him, and did, at the time of the commencement of this suit, and does now, reside with him on said new homestead, then she abandoned said homestead of her first husband, Gustavus Hufschmidt; and if the court shall further find that William Meyersick became administrator with the will annexed of said Gustavus Hufschmidt, after the said abandonment, and sold said old homestead for the payment of debts, and conveying the same by proper deed of conveyance to the defendant about 1883, and that he went into possession and now occupies said premises under said sale and purchase, then the judgment should be for the defendant."

1. If the declaration of law which the court gave was correct, it is quite unnecessary to examine any other points in this case, so far, at least, as a homestead right is concerned. It is quite certain that Mrs. Kaes acquired a new homestead at the domicile of her present husband. It is equally certain that she could not lawfully have two homesteads at the same time, any more than she could lawfully have two husbands at the same time. And it is said that "the intention to return, by which the homestead rights are preserved, must be formed at the time the removal occurs. It can have no influence whatever in restoring the right once lost by actual abandonment until executed by an actual resumption of occupancy." And a subsequent unexecuted intention to resume possession would not have the effect to restore the right to hold the homestead exempt. If such right be once lost, and possession of the homestead be again resumed, such resumption of possession will only have the effect of giving origin to a new homestead right, bearing date from the new occupancy, and having no retroactive validity on the old right lost by abandonment, and possessing no force against the rights of third persons acquired in the interim between the loss of the old and the acquisition of the new right.

And it has been ruled, by a court very liberal in the preservation of homestead rights once acquired, that the removal of a family from the homestead constitutes a *prima facie* case of abandonment, and raises a presumption against the claim of homestead, which must be rebutted before such claim can successfully be asserted; e. g., that the removal was only ~~tem-~~

porary in its nature, for some specific purpose, and with the coincident intention of reoccupancy. And while the law does not intend that the homestead shall be converted into a prison, by making the continuous personal occupancy of the premises the absolute basis upon which the homestead right is dependent, yet it cannot be doubted that the length of time that the claimant is absent from his *locus in quo* will constitute an important factor, in connection with other circumstances, in determining whether the aggregate result of all the facts is sufficient to establish that a forfeiture of the acquired right has occurred, by reason of abandonment. Prolonged absence from the homestead, like a removal of the family, is sufficient to cast the *onus* of rebutting the presumption of abandonment on the claimant of the homestead. Though the authorities generally agree that abandonment is a question of fact, and that each case rests upon its own peculiar circumstances, yet, for the most part, they agree that actual removal from the homestead, with no intention to return, amounts to a forfeiture of the right as against creditors and purchasers, although no new homestead be acquired. There is one act, however, on the part of the claimant, whereby the allegation of abandonment may be conclusively proved, and that is, removal coupled with the acquisition of a new home elsewhere. The positions here taken are abundantly supported by authority: Thompson on Homesteads, secs. 259, 265, 267, 272, 279, 285; *Smith v. Bunn*, 75 Mo. 559.

Summarizing the facts in this case, we find a homestead right acquired, and, after such acquisition, the death of the husband; the remarriage of the wife; the almost immediate removal of herself, children, and household goods to the home of her present husband, in another county, where they have continuously resided ever since, a period of nearly four years at the time the trial occurred, and that Mrs. Kaes, when so removing, had no "special intention of returning." If Mrs. Kaes had been *sui juris* at the time the removal from the old homestead occurred, there could be no room to doubt that the usual rule, as to the *animus revertendi* at the time of removal, should dominate as well in her case as in any other: *Wright v. Dunning*, 46 Ill. 271.

I find no authority in point, and this case is one of first impression as to the effect of the removal of a widow who has remarried, and, with her family and household goods, has removed without intention of returning; but inasmuch as, in

regard to a homestead, a widow with a family, as in this case, cannot alienate the homestead; inasmuch as, between herself and her children, it is indivisible, and must so remain till the youngest child becomes of age; inasmuch as such homestead is not subject to the laws relating to devises; inasmuch as a widow thus circumstanced could not if she would, by joining with her second husband, convey the homestead away; and inasmuch, in consequence of all these matters, she is, in so far as concerns her homestead, independent of her recently married husband,—I can discover no sound reason why intention, or lack of intention, of removal should not count for as much where she remarries as where she remains unmarried. This must be so, or else it must be true that a widow, by remarrying and thus creating her own disability, could remove from her old homestead, and being incapable of forming any intention in regard to abandonment, could have that question indefinitely postponed, and she be at liberty, after a lapse of many years, to resume possession of her old homestead, regardless of whatsoever rights may meanwhile have intervened. It seems to me that the whole reason and policy of the law in regard to homesteads, and in regard to the speedy settlement of estates, forbid any such construction. Such a construction would convert what a benignant law has designed for a shield into a sword. I am therefore of opinion that a *feme*, situated as was Mrs. Kaes, was as fully competent to form and execute an intention of abandoning her homestead as though she had remained unmarried. Moreover, as her remarriage and removal were almost concurrent acts, it is not an unreasonable inference that she formed the intention of abandonment of her old homestead prior to the time that she became for the second time a worshiper at the shrine of Hymen.

And for like reasons, as those already given, I do not see why Mrs. Kaes should not be as fully affected by the usual unfavorable presumptions attendant on removal and prolonged absence from her old homestead, and be equally bound to overcome such presumptions, in order to be successful, as would any other person whatsoever. Nor do I see why the effect of her acquisition of a new homestead at the residence of her second husband should not be as conclusive upon her as it would be in any other case; for certainly, the whole theory of the law is repugnant to the idea of two homesteads being in existence at the same time: Thompson on

Homesteads, sec. 279; *Smith v. Bunn*, *supra*. And that law apparently makes no distinction, and is no respecter of persons in this regard, whether laboring under or free from the fetters of coverture. If Mrs. Kaes be not thus concluded by her acquisition of a new homestead, then it would follow, leaving out of consideration the questions of intention and prolonged absence, that though she has not lost the old, yet she has gained a new homestead, and is now the fortunate possessor of homestead rights in duplicate, which is an impossible supposition. For these reasons, I am of the opinion that the trial court correctly refused the declaration of law asked by plaintiffs, and correctly gave that asked by defendants.

2. I have purposely refrained from discussing the question of the effect of the will on the homestead, and have made this case turn on the points set forth in the preceding paragraph. My reasons for doing so are these: I am persuaded that the will has no bearing on this case. Section 2693, Revised Statutes, expressly excepts the homestead out of the laws relating to devises. This exception is in marked contrast to the provisions respecting dower in real estate; for there, when the husband, by will, passes any real estate to the wife, "such devise shall be in lieu of dower out of the real estate . . . whereof he died seised, . . . unless the testator, by his will, otherwise declared": R. S., sec. 2199. And section 2200 required the wife, if she refuses to take under the will, to file her renunciation within twelve months from the probate of the will. There is no such provision respecting renunciation or election as to a homestead; and, as already seen, it is entirely beyond the power of the husband to devise the homestead, as much so as by his sole deed to convey or mortgage the homestead: R. S., sec. 2689.

As the law excepts the homestead out of the law of devises, it is not to be presumed that the husband, in this case, intended to go counter to express statutory provisions, and if he did, his will must yield to the will of the legislature. The very fact, standing alone, that the legislature has made no provision for election or renunciation regarding a homestead, is very strong evidence indeed; but where this fact is coupled with the other already noted, that the homestead is excepted out of the law of devises, they form, as I think, a conclusive argument against the power of the husband by his will to put his wife to her election in regard to her homestead. Reasoning thus, I am of the opinion that the case of *Davidson v. Davis*,

86 Mo. 440, which lays down a rule contrary to the views here expressed, should not be longer followed, as the effect thereof is to nullify the statute. To illustrate this idea in a very pointed way, take the case of a widow left with a family of minor children, and for her benefit provision has been made by will; she accepts the provisions of the will, and still remains with her children in possession of the homestead. Her children, being minors, cannot assent to anything, and cannot be ousted, and so the widow, notwithstanding the case cited, takes both under the will and under the law. This illustration, in my opinion, shows the utter fallacy of the reasoning of the case cited.

3. Touching the question of dower, it is settled adversely to the contention of plaintiffs, by the will, by the statute already cited, and by numerous decisions of this court: *Dougherty v. Barnes*, 64 Mo. 159; *Gant v. Henly*, 64 Id. 162.

The judgment should be affirmed. As to paragraph 2, Norton, C. J., expresses no opinion, and he and the other judges concur on all the other points.

PERSON CANNOT HOLD TWO HOMESTEADS at the same time: *Wright v. Dunning*, 92 Am. Dec. 257.

ABANDONMENT OF HOMESTEAD: See note to *Taylor v. Hargous*, 60 Am. Dec. 607-615, treating the questions discussed in the principal case.

INTENTION TO RETURN MUST EXIST AT TIME OF REMOVAL from the homestead; if formed later, it will be of no avail: Note to *Taylor v. Hargous*, 60 Am. Dec. 608; *Fyffe v. Beers*, 85 Id. 577. In *Shepherd v. Cassidy*, 70 Id. 372, and note 374, it is held that the intention to abandon may be changed at any time before a new homestead is acquired.

REMOVAL FROM HOMESTEAD AS EVIDENCE of abandonment: *Cabeen v. Mulligan*, 87 Am. Dec. 247, and note 249.

WHETHER REMOVAL FROM HOMESTEAD CONSTITUTES ABANDONMENT depends upon the facts in each case: *Fyffe v. Beers*, 85 Am. Dec. 577, and note 582, showing that the length of time the claimant is absent should be considered in deciding the question.

ACTUAL REMOVAL FROM HOMESTEAD, with no intention of returning, is a forfeiture of the homestead right: *Fyffe v. Beers*, 85 Am. Dec. 577.

REMOVAL FROM HOMESTEAD, and acquisition of a new home, is a forfeiture of the old homestead right: *Wright v. Dunning*, 92 Am. Dec. 257; note to *Cabeen v. Mulligan*, 87 Id. 249.

HOMESTEAD MAY BE ABANDONED BY WIDOW under no disability, after the death of her husband, in the same manner as he could have done: *Wright v. Dunning*, 92 Am. Dec. 257, and note 262.

HUSBAND CANNOT ALIENATE HOMESTEAD by deed or mortgage: *Larson v. Reynolds*, 81 Am. Dec. 444, and note 451; nor by will: *Hendrix v. Seaborn*, 60 Am. Rep. 907.

WIFE, WHEN REQUIRED TO ELECT between bequest and dower: *Leslie v. Smith*, 61 Am. Dec. 706, and note 716.

UNION SAVINGS ASSOCIATION v. SELIGMAN.

[92 MISSOURI, 635.]

ONE DOES NOT BECOME LIABLE AS STOCKHOLDER IN CORPORATION by the issuing to him by the corporation of stock, when the entry in the stock-book, and all the other records of the corporation, show that such stock was issued as collateral security. To make one answerable as a stockholder to creditors of a corporation, he must be a stockholder as between himself and the corporation.

ESTOPPEL. — Voting as a stockholder at an election will not estop the person voting from showing, in an action against him by the creditors of the corporation, that he was not a stockholder therein.

ACT OF VOTING STOCK DOES NOT MAKE VOTERS ABSOLUTE STOCKHOLDERS, either as between themselves and the corporation, or creditors of the corporation. They are still entitled to show that they held such stock as collateral security, and not otherwise.

J. O. Broadhead, for the appellants.

Botsford and Williams, and Joseph Shippen, for the respondent.

By Court, HENRY, J. This is a proceeding by motion in the St. Louis circuit court for execution against Seligman as a stockholder, on a judgment in favor of plaintiff, against the Memphis, Carthage, and Northwestern Railroad Company, an execution having issued thereon against said company, on which a return of *nulla bona* was made. Defendant resisted the motion, on the ground that he was never a stockholder in said company, and this is the only question which it is necessary to consider. The cause was tried upon an agreed statement of facts, and plaintiff succeeded in his motion in the circuit court, and again in the court of appeals, to which the cause was appealed, and from the judgment of the latter court defendant has appealed to this court.

The facts are substantially the following: The Memphis, Carthage, and Northwestern Railroad Company, a corporation organized under the laws of the state, with an authorized capital of ten million dollars, entered into a contract, in writing, with J. and W. Seligman, on the 10th of March, 1872, in which it was agreed that the railroad company should furnish the capital necessary to a complete preparation of the road for iron, and would execute and deposit with the Seligmans its entire issue of first-mortgage bonds, viz., five million dollars, and a majority of their capital stock, the said stock to remain in the control of the Seligmans for one year at least. The Seligmans agreed to purchase two thousand tons of iron under the

direction of the railroad company, and from time to time to make advances of cash, during the progress of the work on the road, not exceeding two hundred thousand dollars, including amount paid for iron, and to receive interest thereon at the rate of seven per cent per annum, until reimbursed by a sale of bonds. For twelve months they were also to have the privilege of purchasing any portion of the five million dollars of bonds at the rate of seventy cents, and accrued interest, less two and a half per cent; and if more bonds were sold than enough to iron the road, they were to advance money to purchase rolling stock, two thousand dollars per mile, the balance to remain on deposit with them, on interest at the rate of call loans, to pay any deficiency in the net earnings of the road to meet interest on the bonds.

If the bonds, or part of them, could not be negotiated during the next twelve months, the company was to repay them all money advanced by them, with interest at seven per cent per annum, and two and a half per cent commission on all bonds returned. On the 1st of May, 1872, the company executed a deed of trust on its railroad and appurtenances, to Jesse Seligman and John H. Stewart, as trustees to secure said bonds; and in pursuance of the agreement and an order of the board of directors of said company, a certificate for sixty thousand shares of its stock was issued to J. and W. Seligman. The stock-transfer book of the company, which it was required to keep by law, contained the list of stockholders, and the stock issued to the Seligmans was entered therein as follows:—

Names.	Residence.	Date.	No. of Shares.	Amount in dollars.
J. and W. Seligman.	New York.	Dec. 20, 1872.	60,000. Sixty thousand held in escrow.	\$6,000,000 Six millions.

In March, 1873, and again in March, 1874, at an election for directors of said company, the stock held by the Seligmans was voted at the first election by one Brown, and at the second by H. T. Blow, as proxies, and at the election in 1874, Joseph Seligman, one of the firm of J. and W. Seligman, was elected a director. The plaintiff's judgment was obtained on a note for \$6,339, dated November, 1872,—after the \$6,000,000 of stock was issued to the Seligmans, but before any other act was done by them which could possibly be relied upon as an estoppel.

The simple act of accepting that certificate of stock, under an agreement in writing, which, as also the entry of the stock in the stock-book, the other records of the company, relating to the transaction, showed that it was held by them only as collateral security, does not make them liable, as stockholders, either to the corporation or its creditors. As long as they held the stock under that agreement, doing no other act, their liability to creditors depended upon their legal relation to the company. If stockholders, as between themselves and the corporation, they would be liable as such to creditors of the corporation; otherwise not: *Burgess v. Seligman*, 107 U. S. 20.

The only ground upon which the defendant can be held liable as a stockholder is that of estoppel, and the act relied upon as creating it is that of voting the stock at elections of directors of the company. Waiving, for the present, a discussion of the question as to the right of the Seligmans to vote the stock, that act did not change their relation to the corporation. That was fixed by the written agreement, and the single act of voting the stock affords no ground for an inference that that agreement had been modified; and the supreme court of the United States, in the case of *Burgess v. Seligman*, *supra*, seems to hold that in no case can one be held as a stockholder by a creditor of the corporation, unless the facts are such that he could be so held by the corporation itself. "The line of authorities usually quoted to show that those who actually hold stock, and who manifest a voluntary or intentional holding, by voting on it [are liable, as stockholders, to creditors of the corporation], . . . consists mainly of cases in which parties have been held as corporators or associates as between themselves and the corporation, or joint-stock association, and as such, incidentally liable to the creditors of such companies." I have supplied the words included in brackets in the foregoing paragraph of the opinion delivered by Mr. Justice Bradley, in *Burgess v. Seligman*, *supra*.

The cases cited in the opinion delivered by this court, in the case of *Griswold v. Seligman*, 72 Mo. 110, are all cases in which the facts were such that the persons sought to be charged as stockholders were held to be stockholders as betwixt themselves and the corporation. In many of the cases, suits were instituted by the corporation against individuals, alleging that they were, and seeking to charge them as stock-

holders. In none of the cases cited in that opinion was there, as in this, a special agreement, showing exactly what relation the parties alleged to be stockholders bore to the corporation. The cases of *Upton v. Tribblecock*, 91 U. S. 45, *Sanger v. Upton*, 91 Id. 56, and *Webster v. Upton*, 91 Id. 65, are all cases in which the corporation, or its assignees, asserted the liability of the defendant as a stockholder; and no cases cited in the opinion delivered in *Griswold v. Seligman*, *supra*, in which one was held liable as a stockholder, at the suit of a creditor of the corporation, who was not, as between himself and the corporation, held to be a stockholder.

The following quotations from Lindley on Partnership are cited with approval in that opinion: "Whenever a person has been treated as a share-holder by the company, and has acted as a share-holder, both he and the company will be estopped from denying that he is a share-holder": Lindley on Partnership, 129. "If a person is a member of a company, as between himself and the company, then, whether he is so by reason of his having become a member by complying with all requisite formalities, or by reason of the doctrine of estoppel, he ought, upon principle, to be deemed a member to all intents and purposes": Id. 12. An argument based upon the doctrine announced by Lindley, in order to have any force or application in this case, must assume that, as between the corporation and the Seligmans, the latter were stockholders, having all the rights, and resting under all the obligations, of stockholders in the company. Will the law, from the act of the Seligmans, in evidence, imply a contract radically different from that contained in the written agreement between them and the corporation? Will it hold them as stockholders in a controversy between them and the corporation, because they voted the stock, which they held as collateral security for payment of the bonds of the company and for advances of money to the company, whether that stock was legally or illegally voted? If, supposing they had the right to do so, they voted the stock, shall they, for that, be held to have incurred an indebtedness to the company of six million dollars, when they supposed they were but protecting a demand they had against it for only several hundred thousand dollars?

The supreme court of the United States, in *Burgess v. Seligman*, *supra*, held that, whether the Seligmans had the right to vote the stock or not, the act of voting it did not make them absolute stockholders, either as between themselves and the

corporation, or creditors of the corporation, but that in either case they had the right to show that they held the stock as collateral security, and not otherwise, and I am of that opinion. This case is not to be confounded with those in which persons, once stockholders, were, by the corporation, released from all liability as such, but were still held liable, as shareholders, to creditors of the corporation, although the corporation itself might not have been able to hold them to liability as stockholders. But I think that section 9, article 11, Wagner's Statutes, page 301, exempts them from any liability as stockholders. It reads as follows:—

"Section 9. No person holding stock in any such company, or executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of the executor, administrator, guardian, or trustee shall be liable in like manner, and to the same extent, as the testator, or intestate, or the ward, or person interested in such fund would have been, if he had been living and competent to act, and held the same stock in his own name."

If the corporation had the right to issue a portion of its authorized capital stock, undisposed of, to be held as collateral security, then, by the express terms of the statute, the Seligmans are exempt from liability as stockholders. That the corporation had the right so to issue the stock, the supreme court of the United States held, in *Burgess v. Seligman*, *supra*, and the same ruling was made by the court of appeals of Maryland, in the case of *Mathews v. Albert*, 24 Md. 527. But if otherwise, then the Seligmans acquired no right whatever in the stock, either to hold or vote it; and certainly, in the face of the written agreements between them and the company, they could not be held by the latter as absolute stockholders, and debtors to the company to the amount of six million dollars, when the sole intent of the transaction was that they should advance money to complete and outfit the road, and hold the stock as collateral security for such advancement. To hold them liable to the company as stockholders, under such circumstances, would be grossly inequitable, and no authority can be found to sanction such a rule.

Our statute, section 9, *supra*, is a copy of the statute of

Maryland, which was construed by the court of appeals of that state, in the case above cited, which bears a striking resemblance to this. One Tieman had loaned a corporation two thousand dollars, and as security, a certificate of stock was issued to him, which, when issued, was absolute on its face, but subsequently an indorsement was placed upon it by the company, stating that it had been issued to Tieman as collateral security. It was contended that the case was not within the statute, and that Tieman was liable to creditors as a stockholder; but the court of appeals gave the following answer to that question, Goldsborough, J., delivering the opinion of the court: "The claim of W. H. Tieman is for two thousand dollars, money alleged to be loaned to the company on the eighth day of January, 1859. But it is insisted by the appellees that Tieman, instead of being a non-stockholder, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tieman to the company. In our opinion, his claim is for money loaned, and the stock transferred to him was held by him as collateral security for his loan, and so holding it, he is not personally subject to any liability as stockholder, but is protected by the provisions of the twelfth section of the acts of 1852, chapter 338." The supreme court of the United States, in *Burgess v. Seligman*, *supra*, placed the same construction upon the statute, and the same view of a similar statute was taken by the commissioners of appeal, in the state of New York, in *McMahon v. Macy*, 51 N. Y. 155.

The supreme court of the United States also held, in *Burgess v. Seligman*, *supra*, that the Seligmans had a right to vote the stock held by them as collateral security. This right was necessary to their protection, and it seems to have been contemplated by the parties that it should be voted. It was a majority of the authorized capital stock, and Jesse and Joseph Seligman testified that the stock was given them in order that they might control the management of the company, so that its earnings should be honestly secured and appropriated to the payment of the bonds. Whether they had the right to vote the stock or not, voting it under an impression that they had the right certainly did not alter their relations to the corporation as established by the written agreement.

It is with reluctance that I agree to overrule any case decided by this court, and this reluctance is the greater where a line of decisions is to be overthrown; but the opinions delivered

in the case of *Griswold v. Seligman*, 72 Mo. 110, and those following it, never had my entire concurrence, and one member of the court dissented, and I am now satisfied that I should not have given even the partial concurrence which I expressed. The supreme court of the United States, every member of that bench concurring, has, since *Griswold v. Seligman, supra*, was decided by this court, announced doctrines in conflict with our rulings in that case. The court of appeals of Maryland placed a different construction upon their statute, of which ours is a copy, from that which we announced in *Griswold v. Seligman, supra*; and the commissioners of appeal of the state of New York, also, in the construction of a similar statute of that state, followed the decision in Maryland; and while we are under no obligations to yield our own and adopt the opinions either of the supreme court of the United States or of the appellate courts of sister states, it is our duty to receive light on doubtful questions, from whatever source it may come. It does not become us to shut our eyes to what other respectable courts have held, and blindly follow what we have decided, because we have decided it. As we said in *State v. Brassfield*, 67 Mo. 34: "In cases appealed from this court to the supreme court of the United States we are bound by its mandates, but in other cases we are no more bound by its decisions than by those of any other respectable court."

Nor has the doctrine of *stare decisis* any application in this case. No rule of property was settled by the case of *Griswold v. Seligman, supra*. No one can possibly have given credit to the bankrupt corporation, on the faith of the ownership of this stock by the Seligmans since that judgment was rendered; and there is no principle of law or equity to prevent us from rectifying the error we committed in that case, and announcing what we are now satisfied are correct principles of law.

The judgment is reversed.

SHERWOOD, J., dissented.

HOUGH, C. J. I am still of opinion that section 9, article 11, Wagner's Statutes, page 301, is not applicable to this case. That section provides that the person holding stock as collateral security shall not be liable as a stockholder; "but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." This statute, I think, clearly applies to stock which has been regularly issued by the company, and which has been pledged by

the holder thereof; for I cannot imagine that the legislature ever contemplated that the corporation itself should be held "liable as a stockholder" of its unissued stock. Undoubtedly, if all the stockholders of a corporation consent, the unissued stock may be sold for a nominal consideration, or be given away to any one they may select as the object of their bounty, and the person receiving such stock could not be made liable to the corporation for the full value thereof, but such person might nevertheless be held liable by creditors of the corporation for such proportion of the value thereof as remained unpaid. I conceive it to be against public policy to permit a corporation to put its unissued stock, to an amount sufficient to control the affairs of the corporation, in the hands of a person who is in no event to incur any responsibility as a stockholder to creditors, by holding and voting the same, and thus managing and controlling the affairs of the corporation.

LIABILITY OF HOLDER OF STOCK AS COLLATERAL. — The case of *Burgess v. Seligman*, 107 U. S. 20, arose out of the same transactions under consideration in the principal case. In the case of *Griswold v. Seligman*, 72 Mo. 110, also involving the same questions, the supreme court of Missouri had held that the defendants could not claim immunity from the creditors of the corporation, on the ground that they held the stock as collateral security, for the reason that the stock was issued directly to them by the corporation, — stock so issued standing, in the opinion of the court, in a substantially different position from stock which had been issued to a stockholder, and by him transferred to secure a loan. Upon this question the supreme court of the United States said: "The argument that the exemption from liability in cases of stock held as collateral security applies only to those who have received it from third persons who were stockholders, and who can be proceeded against as such, seems to us unsound, and contrary both to the words and the reason of the law. It takes for granted that stock cannot be received as collateral security from the corporation itself, and still belong to the corporation; and yet we know that such transactions are very common in the business of this country. The words of the statute are positive, and relate to all holders of stock for collateral security. They are as follows: 'No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company.' The reason of this law is derived from the gross injustice of making a person liable as the owner of stock when he only holds it in trust or by way of security, and from the inexpediency of putting a clog upon this species of property, which will have the effect of making it unavailable to the owner, or of deterring prudent and responsible men from accepting positions of trust when any such property is concerned. It seems to us that not only the law, but the reason upon which it is founded, applies to the holders of stock as collateral security, whether received from an individual or from the corporation itself. It is argued, however, that the remaining words of the law are repugnant to this view. These words are as follows: 'But the person pledging

such stock shall be considered as holding the same, and shall be liable as stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian, or trustee shall be liable, in like manner and to the same extent as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name.' The argument is, that these words imply that there must always be some person or estate to respond for the stock, or else the exemption cannot take effect. The obvious answer to this is, that this clause fixes the liability upon the pledgor as a stockholder, where there is a pledgor who can be made liable in that character. When the corporation pledges its own stock as collateral security, though it cannot be proceeded against as a stockholder *co nomine*, the reason is because it is primarily liable, before all stockholders, for all its debts. In such a case the clause last quoted would not strictly apply to it, but the holder of its stock as collateral security would be both within the letter and the spirit of the first clause. It is supposed that some flagrant injustice would ensue if there was not some one who could be reached as a stockholder in every case of stock pledged as collateral security; hence stock pledged by the corporation itself must be regarded as belonging to the pledgee, though no other pledgee of stock is treated in this way. Where is the justice of this? Why should the stock be necessarily considered as belonging to some one besides the corporation itself? Is any one harmed by considering the corporation as its true owner? If the stock had not been issued as collateral security, it would not have been issued at all; it would not have been in existence. Would the creditors have been any better off in such case? They are better off by the issue of the stock as collateral, because the general assets of the company have received the benefits of the moneys obtained by means of the pledge. The more closely the matter is examined, the more unreasonable it seems to deny to a pledgee of the corporation the same exemption which is extended to the pledgee of third persons. We think that the one equally with the other is protected by the express words and true spirit of the law."

NATURE AND EXTENT OF STOCKHOLDER'S LIABILITY: See note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96-104; note to *Freedland v. McCullough*, 43 Id. 694-703; and *McCarthy v. Lavischo*, 31 Am. Rep. 83, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PIPER *v.* HOARD.

[107 NEW YORK, 67.]

STATUTE OF LIMITATIONS RUNS AGAINST WEAK-MINDED PERSON, whose mental infirmity does not amount to idiocy nor lunacy, from the time of the discovery of a cause of action based upon fraud, such fraud having been explained to him so that he was made to understand it, though with some difficulty.

STATUTE OF LIMITATIONS ONCE SET IN MOTION continues to run, notwithstanding undue influence exercised by the defendant over plaintiff, the latter being weak-minded, but not an idiot nor lunatic.

STATUTE OF LIMITATIONS IS PROPERLY PLEADED, when to a complaint seeking relief on the ground of fraud the answer pleads that the cause of action did not accrue within six years before the commencement of the action.

PLAINTIFF, Caroline C. Piper, as sole heir of her father, Frederick Piper, deceased, brought this action in February, 1881, to set aside a deed made by her father in 1859. Judgment, entered in favor of defendant at a special term of the supreme court, was affirmed at the general term, whence an appeal was prosecuted to this court.

A. M. Beardsley, for the appellant.

A. H. Prescott, for the respondent.

By Court, FINCH, J. The facts of this case are only important as they bear upon the inquiry, when the cause of action accrued, and the statute of limitations began to run. The plaintiff, as sole heir of her father, seeks to set aside a deed made by him in February, 1859, to the defendant, and a sub-

sequent settlement which confirmed it, on the ground that both were the product of fraud and undue influence. A jury to whom special issues were submitted decided the facts in favor of the plaintiff, and their conclusion was adopted by the court. We are to assume, therefore, that the deed and the settlement were fraudulent, and might have been avoided by Frederick Piper in his lifetime at any moment after they came into existence. But the action is conceded to have been of a character solely cognizable in equity, and founded upon a fraud, and the statute did not begin to run until the discovery of that fraud. The trial judge found as a fact that, for a period of sixteen years before his death, Frederick Piper could have maintained an action for the same substantial relief now sought; and it is involved in that finding, and more plainly disclosed in the opinion, that during all that time he had a full knowledge of the facts constituting the fraud. While he was somewhat weak-minded, he was by no means destitute of mental capacity or understanding, and was able to know and comprehend the facts which transpired. He knew that he made the deed to Hoard, and the consideration for it. He knew, also, for he was expressly told, that the conveyance could be avoided for fraud; and after the whole matter had been explained to him, not only by his wife but by the counsel chosen to protect and enforce his rights, he gave his consent to the commencement of an action which alleged that fraud, and sought to rectify it. At that date he knew all the facts, and their wrongful and fraudulent character. The only influence then operating upon him was the perfectly proper influence of his wife and his counsel. Mr. Throop testifies that the whole situation was explained to him; that he was made to understand it, although with some difficulty and delay; and that when he did consent he answered intelligently and rationally. This witness was the first one called on behalf of the plaintiff, and was the counsel chosen to redress the existing wrong. The fraud at that moment was complete. It had been discovered, and was fully known to Piper and his advisers,—so fully that it served to found an action in his behalf as complete in its allegations of fraud and undue influence as the one before us. The statute of limitations began then to run, and of course continued to run unless stopped by some statutory provision: Code Civ. Proc., sec. 408. It may be true, and doubtless is true, that Piper did not realize as clearly and distinctly as others the force of the facts brought to his knowledge, and the

extent and scope of the wrong which had been done him. But he was neither idiot nor lunatic; he had memory, sense, and judgment; a mental capacity of low grade and a lack of independence and will, but yet sufficient ability to understand and comprehend; and that supplemented by the aid and advice of intelligent and competent friends. It is impossible not to see that at this point of time a discovery of the fraud had occurred. I do not understand that the question whether such a discovery has taken place depends upon the mental condition of the party injured, where he has legal capacity to act and to contract, nor upon his freedom from undue influence or ability to resist it. If he has ascertained the facts which constitute the fraud, and so has discovered its existence, the statute begins to run, irrespective of the degree of intelligence possessed by the injured party, and whether he has enough of courage and independence to resist a hostile influence, and assert his rights or not. In either event there has been discovery of the fraud; the right of action has fully accrued, and the statute begins to run.

Soon after the action of Frederick Piper to cancel the deed had been commenced, the defendant, Hoard, seems to have regained his influence and control over him. The defendant induced him to discontinue his action, making a new arrangement, to which the wife was a party, and assuming a new liability as a consideration for the conveyance. This settlement the jury and the court found was itself fraudulent. It indicates a new exertion of undue influence to nullify and avert the grantor's effort for redress. That finding leaves the original fraud unpurged, and the right of action it gave undischarged, but I am unable to see how it could stop the running of the statute of limitations. The law provides for no such disability. We cannot add it to the statute. The new wrong might possibly give a new right of action, but could not suspend the existence of the old one. The cases cited in behalf of the plaintiff do not reach the difficulty. Most of them relate merely to the effect of laches or acquiescence as excused or disarmed by the continued presence of undue influence, and have no relation to the peremptory command of a statute: *Sharp v. Leach*, 31 Beav. 491; *Gowland v. De Faria*, 17 Ves. 25; *Kerr on Fraud*, 301. In one, the question arose over the adverse possession of a slave under a statute of the state; and the actual possession was held not to be adverse, because of a continued undue influence which prevented cor

sciousness of any adverse character attending the possession: *Oldham v. Oldham*, 5 Jones Eq. 89. Here the statute began to run. There was a time when Piper discovered the fraud, when the facts and their character were explained to him, when he was for the moment free from the domination of Hoard and acting in defiance of it, and when he consented to initiate an action to set aside the deed. We cannot justly say that he did not then and there, not only discover, but realize to some extent, the fraud practiced upon him. That set the statute running; and it continued to run, unless we import into it a new disability not among its terms: Code Civ. Proc., sec. 396. We therefore see no answer to the defense of the statute.

It was sufficiently pleaded. The code provides that the right of action is deemed to have accrued when the fraud is discovered, and not sooner: Sec. 382; and the answer pleads that it did not accrue within six years before the commencement of the action. That was enough.

It is claimed, in addition, that the complaint contained a cause of action in the plaintiff's own right, and not derived from her father, and which she asserted in due season after the disability of infancy was ended. That cause of action is said to exist in the false representations made to her mother by Hoard to induce the marriage contract, and which he could be required to make good to the issue of the marriage. But the complaint does not rest upon any such right. That cause of action concedes the validity of the deed to Hoard, and seeks to impose a trust upon the property conveyed by it, and is utterly inconsistent with the allegations of the complaint, which deny wholly the validity of the conveyance and the legal title of Hoard. The suggested cause of action was very properly made the subject of a new suit, which is itself before us on appeal, and should not be further considered here.

The judgment should be affirmed, with costs.

Judgment affirmed.

UNTIL FRAUD IS DISCOVERED, STATUTE OF LIMITATIONS DOES NOT RUN: *Ferris v. Henderson*, 41 Am. Dec. 580; *Wear v. Skinner*, 24 Am. Rep. 517; *Hoyle v. Jones*, 89 Am. Dec. 273; *Munson v. Hallowell*, 84 Id. 582, and note; *Boyd v. Blankman*, 87 Id. 146, and note 163; *Adams v. Guerard*, 76 Id. 624; *Smith v. Fly*, 76 Id. 114, note; *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313; *Vizus v. O'Bannon*, 118 Ill. 334; *Bohm v. Bohm*, 9 Col. 100. Whether the same is true in a court of law, see *Snodgrass v. Branch Bank*, 60 Am. Dec. 511, note. Where there is fraud in a transaction, the statute of limitations begins to run only upon the discovery of such fraud, or from the time

when a person with ordinary care and diligence could have discovered it. Facts sufficient to put such a person upon inquiry are equivalent to actual knowledge of the fraud: *Parker v. Kuhn*, 59 Am. Rep. 840; Angell on Limitations, sec. 187; *Penobscot R. R. Co. v. Mayo*, 24 Am. Rep. 45; *Parker v. Kuhn*, 21 Neb. 413. In actions for relief in equity in courts of the United States upon the ground of fraud, the statute of limitations does not run until with due diligence the fraud might have been discovered, and this rule is not affected by section 382 of the code of New York, as amended in 1877: *Kirby v. Lake Shore etc. R. R. Co.*, 120 U. S. 130. Courts of equity will not interpose if a party slumbers upon his rights unreasonably after the detection of fraud, or means offered of detection: Angell on Limitations, sec. 190, and cases cited. Action for damages for injury to property by false representations is barred in six years in New York: *Miller v. Wood*, 41 Hun, 600.

STATUTE OF LIMITATIONS, WHEN IT HAS ONCE COMMENCED TO RUN, CONTINUES TO DO SO: *Stevenson's Heirs v. McReary*, 51 Am. Dec. 102; *Smilie v. Biffle*, 44 Id. 156, and note 159; *Bensell v. Chancellor*, 34 Id. 561. It continues to run regardless of any subsequent disability: *Kistler v. Hereth*, 39 Am. Rep. 131, and note 134; *Nicks v. Martindale*, 18 Am. Dec. 647, note 649; *Chapin v. Freeland*, 56 Am. Rep. 701; *Moore v. Armstrong*, 36 Am. Dec. 68. When it commences to run in the lifetime of decedent, it will not be suspended by his death: *Miller v. Surls*, 65 Id. 596; *contra* and exceptions, see cases cited in note to same. Absence from the state of a holder of a tax deed will not prevent the statute from running in his favor: *Beebe v. Doester*, 36 Kan. 666. Where it has commenced to run in one state in favor of a possessor of personal property, a removal by him to another state with a longer period of prescription will not revive the cause of action: *Brown v. Brown*, 48 Am. Dec. 52. The running of the statute is suspended during the absence of the debtor from the state: *Armfield v. Moore*, 97 N. C. 34. Where the first criminal action against a defendant is dismissed because the indictment did not correspond to the requirements of the statute, and a second indictment is found on the dismissal of the first, the running of the statute of limitations is suspended during the time which elapsed between the finding of the two indictments: *Smith v. State*, 79 Ala. 21.

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[107 NEW YORK, 72.]

THAT CASE IS NOVEL, and not clearly within the limits of any adjudged case, does not of itself warrant the denial of relief to a complainant in equity.

FRAUD IS NOT MITIGATED by showing that it consisted of fraudulent representations, made to induce a woman to marry from mercenary motives.

LAW OF MARRIAGE as administered by the courts is founded on business principles, in which the utmost good faith is exacted, and the least fraud made a subject of judicial cognizance.

THAT WOMAN WAS TOO READY TO MARRY FROM MERCENARY MOTIVES will not debar her, nor the child of the marriage, from relief based on fraudulent representations made to her to induce her to contract such marriage.

UNDER MARRIAGE SETTLEMENTS, ISSUE take their interests as purchasers under both parents.

ESTOPPEL. — Person representing that certain property belonged to one then negotiating a marriage is estopped from denying the truth of such representations, when to do so would disappoint expectations raised thereby.

ISSUE OF MARRIAGE BROUGHT ABOUT BY FALSEHOOD AND FRAUD of defendant may call him to account for such fraud, and bind him to make good the thing in the manner in which he represented it, so that it shall be as he represented it to be.

ONE MAY BE CONSTITUTED TRUSTEE, EX MALIFICIO, IN FAVOR OF PERSON NOT IN ESSE, by fraudulent representations, if the latter merely seeks to obtain property which the former holds by virtue of his fraud, and which the latter would be entitled to hold if the representations had been true.

BILL in equity by Caroline C. Piper, daughter of Frederick and Catharine Piper, praying to be declared the owner of a certain farm in the possession of the defendant. The defendant having demurred to the complaint, his demurrer was overruled.

C. D. Adams, for the appellant.

A. M. Beardsly, for the respondent.

By Court, **PECKHAM, J.** This case comes here upon a demurrer to the plaintiff's complaint, as not stating facts sufficient to constitute a cause of action. The special term overruled the demurrer, and granted defendant leave to answer upon payment of costs. This privilege the defendant refused to avail himself of, and final judgment was duly entered against him. He appealed therefrom to the general term, where the judgment was affirmed, with costs, and leave was again granted him to answer on payment of costs, and again the privilege was refused, when final judgment of affirmance being entered, the defendant appealed to this court.

The complaint develops a curious state of facts. Its material averments are as follows: The plaintiff resides in the city of Utica, and the defendant in Herkimer County. In 1842 one Andrew Piper died, a resident of that county, leaving a will which was duly proved, and by which he left all his property, including the farm in question, to his two sons, James and Frederick, and subject to the limitation in the case of Frederick, that if he should die without issue the portion of the estate devised to him should belong, and was thereby devised, to the brother James and his heirs. James and Frederick took possession of the farm (which consisted of 140 acres in Herkimer County), and continued to own it together until

March 26, 1859, when Frederick conveyed his interest therein to defendant, who had, prior to 1859, married a niece of Frederick. In 1875 Frederick died. After defendant had procured a deed of his interest from Frederick in the farm above mentioned, the defendant went to Utica to see one Catharine Hogel for the purpose of bringing about a marriage between her and Frederick, and thus procuring an heir to him, and defendant persuaded Catharine to go and see Frederick, defendant paying the expenses of the trip. In order to persuade Catharine to marry Frederick, and in the course of his efforts in that direction, and referring to the interest of Frederick in the farm, the defendant falsely and fraudulently represented to her that Frederick had a fine property so left to him that if he married and had an heir the land would go to the heir; that, induced by such statements and representations made to her by the defendant, Catharine did marry Frederick on the eleventh day of April, 1859, the result of which marriage was the birth of the plaintiff within a year thereafter, and she is the only child of such marriage.

In September, 1859, the farm was duly partitioned between James Piper and the defendant, as the grantee of Frederick, by an interchange of deeds conveying the respective parts, and the defendant, since such conveyance, has occupied the part set off to him as the owner thereof, and still occupies and claims to own it. The relief prayed for was, that plaintiff be declared the owner of the portion of the farm set off by partition to the defendant, and that plaintiff be placed in possession of the same. The judgments appealed from grant such relief, and defendant asks for their reversal while admitting the facts above stated. There was no opinion written by the learned judges at the special or general term, and we have not the benefit of their views upon this question.

The defendant, while confessing that he procured the fee of the farm (through this marriage), owned by the plaintiff's father, by means of his own fraudulent representations, yet claims that the plaintiff has no right of action against him on that account, because there is a lack of privity between him and plaintiff, and that plaintiff was not induced to any action by reason of his fraud, and sustained no legal damage therefrom, and cannot therefore recover any from him, but must sit by and permit the land once owned by her father to be enjoyed by defendant, although procured by him by means of this fraud.

If to assume jurisdiction and grant relief in such a case would be to run counter to well-settled rules of equity, that fact would be a sufficient answer to the plaintiff's prayer for judgment herein. But if the most that can be said is, that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment. The spectacle of an individual enjoying property acquired by means of an admitted fraud is not one which appeals with any great force to the sympathies of a court in a civilized land in behalf of the perpetrator of the fraud. Such fraud is not in the least mitigated in its character by the statement that it consisted of fraudulent representations made to a woman to induce her to consent to a marriage in which the mercenary motive was the strong if not the only one. The fact that she was ready and desirous of bettering her condition, even though it was by a mercenary marriage, does not alter the other fact that the defendant enjoys property which he has acquired by the successful perpetration of a fraud, and which, if the fraudulent representations by which he acquired it had been true, the plaintiff herein would be herself entitled to enjoy as owner.

Marriage has its sentimental and business sides. Courts have very little to do with the former. The whole law of marriage, as administered by courts (so far as property interests are concerned), is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance. To say of plaintiff's mother, therefore, that she was too ready to marry a man because of the money he had, or would necessarily leave to a child of the marriage, or that she was an adventuress, induced to marry solely by fraudulent representations as to the pecuniary condition of her husband, does not, as I have said, furnish the least reason for refusing relief to plaintiff if she be otherwise entitled to it. If her mother had not been induced to marry by any such pecuniary considerations, clearly no cause of action would exist. It is because such considerations were the moving ones, and were induced by the fraud of defendant, that the plaintiff bases her right of action. There are some anomalies in the law relative to contracts or negotiations having marriage for their consideration, and such contracts are based upon considerations which obtain in no other contract. The family relations and their regulation are so much a matter of public policy that the law

in relation to them is based on principles not applicable in other cases; and all business negotiations having marriage for their end are regarded in much the same light by our courts. Thus a *particeps criminis* in the fraud has been permitted to recover in his own name against one who was no more guilty than he, when the marriage had taken place by reason of such fraud.

In *Neville v. Wilkinson*, 1 Brown Ch. 543, decided in 1782, the plaintiff was the individual who desired to marry his co-plaintiff's daughter; and he and the defendant, who was an attorney to whom he owed a large amount of money, agreed that defendant should represent to the father that the debt was much less than in truth it was. He did so; and after marriage he brought an action on a bond which would have made the debt in excess of the amount represented, and the plaintiff, the *particeps criminis*, was permitted to succeed in an action brought by him and his father-in-law to compel the surrender of the bond. The case is not cited as analogous to the one under discussion, but as proof of the statement that there are anomalies in this branch of the law. The reason has been already stated.

In *Roberts v. Roberts*, 3 P. Wms. 66, decided in 1730, A had treated for the marriage of his son, and in the settlement on the son, a power was reserved to the father to jointure any wife whom he should marry in two hundred pounds per annum, in which case he was to pay the son one thousand pounds. The father subsequently desired to marry a second time, and the son agreed with the second wife's relations to release the one thousand pounds, and did release it, but took a private bond back from the father for its payment. It was held that equity would not set aside the private bond, because it would be injurious to the son's wife, whose marriage had taken place prior to the second one of the father; and being prior in point of time, its equity must prevail. The master of the rolls said that the same arguments, advanced to show that the bond should be discharged as an injustice to the second wife, showed it should be paid, or equal injustice would occur to the son's wife, and the maxim, *Qui prior est in tempore*, etc., should prevail. He also said that equity abhors all underhanded agreements in cases of marriage; "and perhaps this may be the only instance in equity where a person, though *particeps criminis*, shall yet be allowed to avoid his own acts." Many other cases of a similar nature might be cited.

Although these are instances of fraud arising in relation to marriage settlements, it is not perceived why courts may not go a step further in the same direction, and permit a recovery on the part of a person situated like the plaintiff. The anomaly would be no greater in this case than in the others, and a man holding property through fraud would be compelled to give it up to the person who would be entitled to it if he had spoken the truth.

Under marriage settlements, it is held the issue take their interests therein as purchasers under both parents, and hence may compel the payment into the fund by the promisors on the part of the wife, although those on the part of the husband had failed to pay in what they promised, because non-performance on one part shall be no impedient to the children receiving the full benefit of the settlement: See *Harvey v. Ashley*, 3 Atk. 607, 611. The action is sustained on the ground that the settlement was something in which the children were interested, and were privy to the party promising. Is there not sufficient privity in such a case as this between the defendant and the issue of the marriage induced by his fraud, where the fraud consists of false and fraudulent representations made by him to the mother, which, if true, would entitle the issue to the ownership of the very property which he holds by virtue of such fraud? We think these facts create sufficient privity between the parties to sustain such an action as this. It is true, the plaintiff was not born when the fraudulent representations were made. Still they were made by defendant to plaintiff's mother for the purpose of inducing a marriage between the parents, and if they had been true, the plaintiff would have been the owner of this particular property. In this way she is the very person injured by the fraud, and although not individually in the mind of defendant when he perpetrated that fraud, yet, as filling the position of heir to her father, she belongs to the class which defendant had in contemplation when he represented to the mother that the heir of Frederick would have the farm. In this way it may be claimed that defendant had in view the plaintiff, and the rights he alleged she would have. Why should not the plaintiff be permitted to hold the defendant to his representations? The English courts have held that a person who, by acts or speech, represents property as belonging to the proposed husband, when the possession thereof forms an inducement to the marriage, shall be bound to make good the thing in the man-

ner represented. Such is the case of *Montefiori v. Montefiori*, 1 W. Black. 363, Easter term, 1762, Mansfield, C. J.

The facts of the case were these: Montefiori being engaged in a marriage treaty, his brother Moses, to assist him in his designs and represent him as a man of fortune, gave him a note for a large amount of money as the balance of accounts between him and his brother Joseph, which balance he acknowledged to have in his hands, though in truth none existed. This note was shown by Joseph to the parents of the intended wife, and was an inducement to the marriage. After the marriage Moses desired to reclaim the note so given without consideration, and the matter was referred to arbitration, and the arbitrators awarded the note to be given up, which Joseph refused to do, and the case then came up on motion for an attachment against Joseph for non-performance of the award, and Joseph made a cross-motion to set aside the award. Chief Justice Mansfield held that where there were proposals of marriage, and third persons represented anything in a light different from the truth, even though by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be, and the husband alone shall be entitled to relief as well as when the fortune has been specifically settled on the wife.

Atherly in his work on marriage settlements (27 Law Lib., c. 34, marginal paging 484), after citing the above case, says that the principle upon which the court proceeds in such cases, when the thing is not actually made the subject of the settlement, must be this, as he conceives, that as the wife must be presumed to agree to the marriage as well in expectation of the present support which she and her children will receive from her husband as of the provision which he may have made for them after his death, that a person who has been at all concerned in raising such expectation shall not be suffered in any wise to disappoint it.

Here in the case at bar it is necessary to take but one further step in order to maintain the action. It is only necessary to hold that the issue of the marriage, which was brought about by the falsehood and fraud of the defendant, shall be able to call him to account for such fraud, and bind him to make good the thing in the manner in which he represented it, so that it shall be as he represented it to be. We see no reason why such step should not be taken. There is certainly none in the

position of the defendant, who stands before the court the possessor of property by reason of his fraud, which property, if it were as it was represented by defendant, would belong to the plaintiff herein. She can claim to be in privity with defendant, although he made the representations to her mother, because she is the child of the marriage brought about by the fraud of the defendant practiced upon the mother, and because she would be the owner of this property if the facts were as they were represented by the defendant to the mother.

It is true, her own action was in no wise influenced by these representations, for she was not then born. But where, in the peculiar and anomalous rules obtaining in that branch of the law regarding marriage, marriage settlements, and frauds in relation thereto, a marriage is induced under circumstances such as exist in this case, we think there is no trouble in holding the defendant bound by his representations, and that, in the character of a trustee *ex maleficio*, he shall be held to make good the thing to the person who would have the property if the fact were as he represented it, assuming such person to be the fruit of the marriage brought about by those very representations.

The leading principle of this remedial justice is, by way of equitable construction, to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense: *Perry on Trusts*, sec. 170.

There is no legal objection towards constituting such a trustee in favor of one who was not *in esse* when the fraud was perpetrated, so long as it can be seen that such person seeks to take the property which the defendant holds by virtue of his fraud, and which such person would be entitled to hold if the representations the defendant made in regard to it were true. Equity will fasten upon a legatee or devisee the character of a trustee, *ex maleficio*, where he procured the legacy or devise by fraudulently promising the testator to apply it for the benefit of others: See cases cited in *Matter of Will of O'Hara*, 95 N. Y. 403, 412, 413; 47 Am. Rep. 53. The principle would be just as applicable if the fraudulent legatee had made the promise by which the legacy was procured for the benefit of some one thereafter to be born. The refusal to perform after the party comes into existence would be just as much a fraud as if refusal were in regard to one existing when the promise was made.

In the case last cited, regarding the will of O'Hara, *supra*, the legatees were converted into trustees *ex maleficio* in favor of the heirs at law and next of kin of the testatrix, not one of whom, perhaps, was living at the time the will was executed and the promise made. There can be no objection, therefore, to holding this defendant as such trustee, based upon the fact that when he made the false representations the plaintiff was not living. They were made in her favor, and they can inure to her benefit.

By a decision of this case in this manner, we think at least the cause of common honesty and decent morals is upheld, while at the same time no rule of law or equity is violated. The facts, as we have said, are quite novel in their character, and the result is, that a man who has procured property by fraud is prevented by a court of justice from further enjoying it, and compelled to surrender it to one who is the daughter of the person from whom he procured it, and who would be entitled to it if the representations which he made, and by which he now enjoys it, were true. Such a result cannot be other than satisfactory.

The defendant asks, if his demurrer be overruled in this court, that he be permitted to withdraw it, and answer, on payment of costs. He has twice refused this favor in the supreme court. We suppose that we have the power to grant it now under section 497 of the code. Formerly, in such a case as this, it was decided that this court did not have the power to grant such leave: *Whiting v. Mayor etc. of New York*, 37 N. Y. 600.

Under the circumstances, we do not think it would be well for us to grant the leave desired. Changes may have taken place since the action was commenced which might have weight in deciding the merits of the application, such as the loss of testimony on the part of the plaintiff, or other changes of that nature. Justice will be better attained by remitting that question to the supreme court, where both sides may be heard upon an application, and all the questions have appropriate consideration.

The judgment should, therefore, be affirmed, with costs, with leave to defendant to apply to the supreme court for leave to withdraw the demurrer and interpose an answer.

RUGER, C. J., and ANDREWS, J., dissented.

Judgment accordingly.

MARRIAGE SETTLEMENT. — Equity will enforce only in favor of a husband or wife, or their issue, or those claiming under them: *Merritt v. Scott*, 50 Am. Dec. 367. Enforcement of may be compelled by any person within the scope of the consideration of the marriage, or by any one deriving title through such person, but not by a mere volunteer, even although such volunteer stands in the position of a wife or child; but when action is brought by a person entitled to bring the same, the settlement will be given effect in favor of a volunteer, as well as in favor of the party bringing the action: *Id.* Right to enforce marriage settlement after wife's death survives to her personal representatives, and not to her legatees: *Mitchel v. Mitchel*, 41 Id. 237. Marriage settlement cannot be reformed by persons who are neither the issue of the marriage nor the heirs of the contracting parties, although such persons are included within the provisions of such settlement: *Cook v. Walker*, 68 Id. 461.

ESTOPPEL BY REPRESENTATIONS FALSELY MADE: *Cowles v. Bacon*, 56 Am. Dec. 371; *Pierce v. Andrews*, 52 Id. 748; *Partridge v. Stocker*, 84 Id. 664; *Russell v. Maloney*, 94 Id. 358.

OWNER'S ESTOPPEL CREATED BY STANDING BY AND ENCOURAGING ANOTHER TO BUY LAND: *Guffey v. O'Reilly*, 57 Am. Rep. 424, and note: *Tongue's Lease v. Nutwell*, 79 Am. Dec. 649; *Workman v. Guthrie*, 72 Id. 654; *Saunderson v. Ballance*, 67 Id. 221.

TRUSTEE EX MALEFICIO. — A person purchasing property at an execution sale for less than its value, by falsely representing that he is acting for and in the interests of his principal, will be held as a trustee for such principal: *Grumley v. Webb*, 100 Am. Dec. 304. One who procures property of another by artifice or fraud is trustee *ex maleficio*: *Bugle v. Wents*, 93 Id. 722; *Ryan v. Dox*, 90 Id. 696, and extended note 708. Where vendor sells land representing that an entire tract can be acquired under a warrant, when in fact only part can legally pass, and subsequently purchases the residue of the tract for himself, he will be treated in equity as a trustee *ex maleficio*: *Tyenn v. Passmore*, 44 Id. 181.

CLARK v. MOSHER.

[107 NEW YORK, 118.]

INTERPLEADER — JURY TRIAL. — Where, under the code, the defendant obtains an order substituting a third party as defendant, and pays the moneys claimed into court, in order that the substituted defendant and the plaintiff may litigate and determine their respective claims to such moneys, the action thereupon becomes an equitable suit, in which neither party is entitled to a jury trial, and the verdict of a jury, if one is called, may be disregarded by the court.

ACTION on policy of life insurance. The original defendant, the Phoenix Mutual Life Insurance Company, pursuant to section 820, Code of Civil Procedure, made an affidavit, stating that Mosher claimed to own the policy, and moved to be discharged on paying into court the sum sued for. The motion was granted, and Mosher was substituted as defendant. At the trial, although defendant claimed that it was an equity

case, a jury was called, and one issue of fact submitted to them, which they found for plaintiff. The court, however, declining to be bound by the verdict, found the fact the other way, and gave judgment for defendant.

N. C. Moak, for the appellant.

E. Countryman, for the respondent.

By Court, RAPALLO, J. If the counsel for the defendant was right in the position which he took at the circuit, that this was an equity case triable by the court, the practice adopted by the trial judge in impaneling a jury, and submitting to it a single question of fact, to be answered in the affirmative or negative, was correct. The judge was also right in holding that he had the power to disregard the finding of the jury on the question thus submitted, and to find the fact the contrary way; and the judgment for the defendant entered pursuant to his findings and conclusions was regular: *Carroll v. Deimel*, 95 N. Y. 255.

The court at general term held, on the motion to set aside that judgment, that the action was one at law for the recovery of money only, in which the plaintiff was entitled to a trial by jury; that the judge consequently had no power to disregard the verdict and substitute his own findings; and that the judgment entered thereon was irregular.

We are of opinion that the trial judge was right in holding, as claimed by the defendant, that the action was of an equitable nature, and triable by the court. The plaintiff had no right of action at law against the defendant, and did not seek to recover any money from him. The money in controversy was in court, having been paid into court by a third party, the Phoenix Mutual Life Insurance Company, under an order made on the application of that company pursuant to section 820 of the code. The plaintiff had brought an action at law against the company upon a policy of insurance, and the company, admitting its liabilities on the policy, set up that the defendant's intestate also claimed the amount of the policy, and by this proceeding in the nature of a bill of interpleader, on payment of the fund into court, the plaintiff was required to substitute the defendant's intestate as defendant, and the object of this action was to determine the conflicting claims of the plaintiff and the defendant to the fund in court. Neither party had any right of action at law against the

other, but by this equitable proceeding, authorized by the code, the insurance company against whom both claimed a legal cause of action was discharged, and they were brought together to litigate the question which of them had the better right to the fund in controversy. No right of trial by jury ever existed in such a case.

The order of the general term should be reversed, and that of the special term affirmed, with costs.

Ordered accordingly.

EFFECT OF SUBSTITUTING ONE PERSON FOR ANOTHER AS DEFENDANT—PLEADING, PRACTICE, FORM OF JUDGMENT, ETC. — *Nature of Proceeding to Substitute, and Effect of.* — The principal case is an instance of the substitution of one person for another as defendant under section 820 of the New York Code of Civil Procedure, which provides for interpleader on motion. This statutory remedy of interpleader has been adopted in most of the states, and is said to be merely a summary method of obtaining relief in cases where a bill of interpleader would lie; and it is held to be governed in general by the same rules as equitable interpleader: See *Shaw v. Coster*, 35 Am. Dec. 710, 711, note, where the cases are collected, and the subject of interpleader discussed at length. It was not the design of the statute to introduce new cases of interpleader, but merely to provide a summary proceeding where interpleader is proper: *Delancy v. Murphy*, 24 Hun, 503; *Pustet v. Flannelly*, 60 How. Pr. 67. And the principles which govern the remedy, either in equity or under the statute, are alike: *Cronin v. Cronin*, 9 Civ. Proc. Rep. 137; *Venable v. New York etc. Fire Ins. Co.*, 17 Jones & S. 481. If no relief could be obtained by bill in equity for interpleader, then it would be an indefensible exercise of judicial discretion and power to make the substitution, on motion, under the statute: *Delancy v. Murphy*, 24 Hun, 503; and see *Nassau Bank v. Yandes*, 44 Id. 55. Nevertheless, statutory interpleader is a remedy designed for use in common-law courts. It permits the defendant, in an action at law, to obtain, in a summary way, in that action, the same relief that he might obtain by filing a bill of interpleader in a court of equity: *McElroy v. Baer*, 9 Civ. Proc. Rep. 133. And the remedy should not be so restricted, or clogged by technical qualifications, as to deprive it of any of the advantages intended to be secured by it under a just and liberal construction and application of the statute: *Barnes v. Mayor etc.*, 27 Hun, 236, 240; and see *König v. New York Life Ins. Co.*, 14 N. Y. 250; *Shipman v. Scott*, 12 Civ. Proc. Rep. 109; but compare *New England Mut. L. Ins. Co. v. Keller*, 7 Id. 109. But statutory provisions authorizing the substitution of indemnitors as defendants in place of the sheriff (see N. Y. Code Civ. Proc., secs. 1421–1427) are said to be innovations in the law, and so seriously modify the ordinary common-law rule of liability as to require a very clear case to be made out before the court will direct such substitution: *Berg v. Grant*, 18 Abb. N. C. 449; and compare *Hayes v. Davidson*, 98 N. Y. 19. See, on the subject of interpleader by sheriffs, *Shaw v. Coster*, 35 Am. Dec. 711, 712, note.

The effect of the statutory proceeding, whereby one person is substituted for another as defendant, is, according to the ruling in the principal case, to change an action, legal in its nature, into an equitable suit; and the principles which govern the remedy in equity then apply: See also *Venable v. New York*

etc. Fire Ins. Co., 17 Jones & S. 481; *Cronin v. Cronin*, 9 Civ. Proc. Rep. 137. But in giving construction to the provisions of the Ohio code, the court held that after the substitution of the new party defendant the case still remains a civil action, and must be proceeded in as a civil action: *Maginnis v. Schoen*, 24 Ohio St. 336. In this case, the action was for the recovery of money, and the original defendant caused a third party, claiming the money, to be substituted in his place, deposited the money in court, and was discharged from liability therefor under the provisions of the code. An issue of fact was joined between the plaintiff and the new defendant, and it was held that the action being for the recovery of money only, either party had a right to demand a trial of the issue by a jury: *Id.*

PLEADING, PRACTICE, FORM OF JUDGMENT, ETC. — No particular mode of procedure applicable to statutory interpleader has been prescribed, and in the absence of any such provision, it is thought that the practice should be, as far as practicable, that adopted by the courts of equity in case of interpleader in analogous cases: See *Wilson v. Lawrence*, 8 Hun, 593; *McElroy v. Baer*, 9 Civ. Proc. Rep. 133; *Nelson v. Goree*, 34 Ala. 565. But it is again said that after it is ascertained that a bill of interpleader is properly filed, there does not appear to be any settled practice as to the mode of proceeding: *City Bank v. Bangs*, 2 Paige, 570; and that the court, in disposing of the questions in dispute among the defendants to a bill of interpleader, is at liberty to adopt any recognized method of trial which will best accomplish justice in the particular case: *Kirtland v. Moore*, 40 N. J. Eq. 106. It appears, however, to be settled, that after it has been determined that interpleader will lie, then, upon bringing the money or other thing in dispute into court, the plaintiff should be discharged from liability, and the action proceed upon the issues between the parties defendant: *Cullen v. Dawson*, 24 Minn. 66; *Cogswell v. Armstrong*, 77 Ill. 139; and see *Shaw v. Coster*, 35 Am. Dec. 708, note. The plaintiff is entitled to be dismissed, with costs: *City Bank v. Bangs*, 2 Paige, 570; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100. If, at the hearing on the bill, the questions in which the defendants are alone interested are stated with sufficient clearness and certainty in the answers to the bill to present proper issues, and they are ripe for decision, the court may, at the same time that it decides the question whether the bill was properly filed or not, also decide questions at issue among the defendants, and dispose of the case finally. But if the case, as among the defendants, is not at that time in condition to be properly disposed of, the court may then adopt such course as may seem best, as by directing that issue shall be raised by appropriate pleadings, or that an action at law shall be brought, or that such other course shall be taken as may seem best suited to the nature of the case: *Executors etc. v. King*, 13 N. J. Eq. 375; *Kirtland v. Moore*, 40 Id. 106; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; and see *Shaw v. Coster*, 35 Am. Dec. 709, note.

Under Indiana practice, interpleader is a case of exclusive equitable jurisdiction not triable by jury, in view of certain statutory provisions on the subject. In such case the court may, however, take the verdict of a jury upon such questions of fact as it shall determine, merely for its information, but the jury cannot find a general verdict. Nor is the court concluded by the findings of the jury, but the decree must be made as the result of its own judgment upon the evidence, aided merely by the jury. Instructions to the jury, given or refused, or the admission or rejection of evidence, cannot therefore be cause for a new trial, nor can the refusal of the court to require the jury to make more specific answers: *Ketcham v. Brasil Block Coal Co.*, 88 Ind. 515; and see *Nofsinger v. Reynolds*, 52 Id. 218; *Dumpling v. Kleiser*.

smith, 11 Wall. 610. Compare *Cullen v. Dawson*, 24 Minn. 63, as to Minnesota practice in interpleader proceedings.

It has been held in New York, in conformity with the suggestion made in Moak's Van Santvoord's Pleading, 358, that where, upon the application of the defendant, an order is made in pursuance of the provisions of the code, directing that he pay into court the money, to recover which the action is brought, and that a third person by whom the same is claimed be substituted as defendant in his place, the plaintiff should apply for leave to serve a supplemental complaint, setting forth such additional facts as may be necessary to show that he has a right to recover the amount claimed as against the defendant. If the plaintiff fails to do so, and proceeds to trial upon the original complaint, the substituted defendant may move to dismiss it, on the ground that as to him it does not state facts sufficient to constitute a cause of action: *Wilson v. Lawrence*, 8 Hun, 593; see 1 Boone's Code Pleading, sec. 40. The order of interpleader served with the complaint should require the party brought in by the interpleader to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court be paid to the plaintiff in case of the failure to appear and answer of the party who is interpleaded: *McElroy v. Baer*, 9 Civ. Proc. Rep. 133; and see *Van Buskirk v. Roy*, 8 How. Pr. 425; *Fletcher v. Troy Savings Bank*, 14 Id. 383.

If the party appears and answers, the issues raised may be tried by the court, unless a jury is demanded at the time of the joinder of issue: *McElroy v. Baer*, 9 Civ. Proc. Rep. 133. The substituted defendant, by his answer to such a complaint, can present proper issues for trial, and the court can render an intelligible judgment upon the issues thus presented: Moak's Van Santvoord's Pleading, 350. Upon the entry of judgment, the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be given: *McElroy v. Baer*, 9 Civ. Proc. Rep. 133. Costs should, in general, be awarded against the losing party: *Id.*; but under special circumstances, the award of costs is discretionary with the court, and they may be allowed or withheld according to equitable principles, and in furtherance of justice: *Cronin v. Cronin*, 9 Id. 137; and see *Bedell v. Hoffman*, 2 Paige, 199; *Atkinson v. Marks*, 1 Cow. 691; *Columbian Building Ass'n v. Crump*, 42 Md. 195.

The plaintiff in a bill of interpleader, or a defendant who obtains a statutory order of interpleader, should offer to pay into court any money and interest which is due from him. But where there was an offer to pay over the fund on being indemnified, which offer was refused, and the bill had been filed with reasonable diligence, the plaintiff was not charged with interest on the money deposited in court: *Richards v. Satter*, 6 Johns. Ch. 445.

A decree passed upon the filing of a bill of interpleader, ordering the complainant to pay the money into court, and requiring the defendants to interplead and answer, is held to be interlocutory, settling the rights of no party, and is at all times prior to a final decree subject to reversion and alteration, being merely ancillary to further proceedings, and does not require a bill of review to vacate, amend, or rescind the same: *Barth v. Rosenfeld*, 36 Md. 604; *Owings v. Rhodes*, 65 Id. 408.

LYNCH v. FIRST NATIONAL BANK OF JERSEY CITY.

[107 NEW YORK, 172.]

BANK IS NOT LIABLE TO PAY CHECK DRAWN THEREON by a depositor, except by its acceptance thereof in writing.

BANK ACCEPTS CHECK DRAWN THEREON, when it indorses upon it a certificate of genuineness, and directs its payment at another bank. Such indorsement is equivalent to a representation that the drawer has funds in the bank with which to pay the check, and that the bank will retain such funds and pay the check at the bank designated.

RELATION BETWEEN BANK AND DEPOSITOR is that of debtor and creditor, and the bank holds the fund subject to be paid out to the creditor, according to the terms and conditions imposed by him.

CHECK DRAWN BY DEPOSITOR, PAYABLE TO HIMSELF OR ORDER and accepted by the bank, does not impose on it any obligation to pay the check to one to whom the drawer delivered the check without indorsement, in payment of a purchase made by him.

ACTION upon a check drawn by F. F. Wilder, payable to himself or order, and by him delivered to plaintiff. Judgment for plaintiff, which was affirmed by the general term. Defendant appeals.

Hamilton Wallis, for the appellant.

Abram Kling, for the respondent.

By Court, RUGER, C. J. It is desirable in the first instance to precisely determine the questions which are presented by the record before us.

The evidence is very brief, and not in any respect conflicting, unless the facts proved are fairly susceptible of opposite inferences in different minds. At the close of the plaintiff's case, the defendant moved for a dismissal of the complaint without stating the grounds therefor, and upon the refusal of the court to grant the motion, took an exception. After the evidence was all in, the court directed a verdict for the plaintiff, to which direction the defendant also took an exception.

These two exceptions present the material points in the case. No request was made by either party to go to the jury upon questions of fact, and the only question presented by the exceptions is, whether upon any view of the evidence the plaintiff was entitled to recover. No objection that any evidence was inadmissible under the pleadings was made, and the action was tried and decided upon the whole case as presented by the proof without objection. From that it appeared that one F. F. Wilder purchased of the plaintiff a diamond of the value of five hundred dollars, and delivered to her in

payment therefor a check signed by himself, and reading with its indorsements, as follows:—

“JERSEY CITY, N. J., June 1, 1883.

“First National Bank, pay to myself or order five hundred dollars.

F. F. WILDER.”

“Certified:

“FIRST NATIONAL BANK, JERSEY CITY.

“Payable at the American Exchange National Bank, New York.

OMBERSON.”

Indorsed: “T. LYNCH R.”

This check was not indorsed by Wilder. Omberson was assistant cashier of the defendant, authorized to certify checks, and certified the one in question on June 1, 1883, at the request of the drawer, while still in his possession, and who at that time had funds in the bank. Upon this evidence, it is clear that there was no contract made between Wilder and the plaintiff whereby any transfer of the deposit in the bank was intended to be made, beyond that which would follow the mere delivery of any check. The action can be supported only by proof that all of the conditions, upon which the authority of the bank to pay the check was made to depend by the drawer, had been performed: *Freund v. Importers' and Traders' Bank*, 76 N. Y. 352, 357.

It therefore seems to us that the only question in the case is, whether the bank could be made liable to pay to third persons Wilder's funds by any transfer of this check, except one evidenced by the indorsement of his name thereon. It is well settled by authority that the mere drawing and delivery of a bank check to a third person by a depositor does not constitute an assignment to the payee therein named of the fund held by such bank: *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94. A check is analogous to a bill of exchange, and a bank cannot be made liable thereon except by its acceptance indorsed upon it in writing: *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421. An acceptance of the check, however, was made by the bank, we think, when through its agent it indorsed thereon a certificate of genuineness, and directed its payment by the American Exchange Bank. That operated as a promise to pay it upon presentation at the American Exchange Bank, bearing Wilder's indorsement. The obligation of the bank as shown thereby amounts to a representation that the drawer has funds in the bank with which to pay the check,

and that it will retain and pay them to the holder through its agency in New York upon presentation there bearing the proper indorsements: *Farmers' and Merchants' Bank v. Butchers' and Drovers' Bank*, 14 N. Y. 623; 16 Id. 125; 28 Id. 425; *Security Bank v. Nat. Bank*, 67 Id. 458, 460; 23 Am. Rep. 129; *Clews v. Bank of New York*, 89 N. Y. 418; 42 Am. Rep. 303.

Such a contract the bank had a right to make, limiting its liability to an order indorsed by the depositor or his payee, and the depositor had the right to impose upon the bank the condition that his money should be paid out by it only upon a check indorsed by himself or its payee. If the bank should disregard such a requirement, it would do so at its own risk, but the holder has no legal right to impose such a liability upon it against its consent. It would certainly add much to the hazard of the transmission of funds by check, draft, or otherwise, through the mail or express, if the banks or agencies upon which they were drawn should be compelled to pay them to the holder by an action at law, where they do not bear upon their face the evidence of the performance of the condition upon which the drawer has authorized their payment.

It was held in *Freund v. Importers' and Traders' Bank*, *supra*, that a certification by the bank of a check in the hands of a holder who had purchased it for value from the payee, but which had not been indorsed by him, rendered the bank liable to such holder for the amount thereof. By accepting the check, the bank took, as it had the right to do, the risk of the title which the holder claimed to have acquired from the payee. In such case the bank enters into contract with the holder by which it accepts the check and promises to pay it to the holder, notwithstanding it lacks the indorsement provided for, and it was accordingly held that it was liable on such acceptance upon the same principles that control the liabilities of other acceptors of commercial paper. In the case at bar, the certification of the bank was made at the request of the drawer, and was subject to the condition imposed by him, plainly written in the check, that it should not thereafter be payable except by his indorsement. The relation existing between a bank and its depositor is that of debtor and creditor, and the bank holds the fund subject to be paid out upon the direction of the creditor, according to the terms and conditions imposed by him: *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Crawford v. West Side*

Bank, 100 N. Y. 50, 56; 53 Am. Rep. 152. The bank's protection in the payment of checks consists in the fact that it has followed strictly the depositor's directions in disbursing his funds. Where a depositor has imposed the condition that his check shall not be paid without it bears his indorsement, the depository, if it pays it to a holder without such indorsement, runs the risk of the transaction, and takes the burden of showing that such holder has acquired in some way the lawful title to receive the funds. It may successfully defend such a payment if it can show that it made it to a person who, as against the drawer, was legally entitled to receive it, for in that event the drawer would suffer no damage thereby.

It was held in *Risley v. Phoenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421, that a parol contract by a depositor for the transfer of the whole or any part of his deposit is valid in law, and invests the transferee with the right to sue for and recover the amount of such deposit, or such part thereof as was intended to be transferred. It was also held in the same case that a depositor might concurrently with the delivery of a check to a third person enter into such a contract by parol as would transfer the fund represented by the check to the person named therein.

In such a case the liability of the depository is not predicated upon the check, but that is used in connection with the parol agreement, as evidence of the contract transferring the fund: *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Risley v. Phoenix Bank*, *supra*. The action arises upon the contract of assignment, and not upon the check.

We are of the opinion that the evidence in this case did not authorize the trial court to find that Wilder intended to transfer any part of his deposit to the plaintiff, and there is no other theory upon which the action can, under the evidence, be maintained. The verdict was, therefore, improperly directed for the plaintiff.

The judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

ACTION MAY BE BROUGHT ON INDORSED NOTE, payable to a particular person, by one who is not the payee: *Jackson v. Love*, 33 Am. Rep. 685. Holder of a note or bill is the presumed owner: *Weakly v. Bell*, 38 Am. Dec. 128, note; *Whiteford v. Burckmyer*, 39 Id. 657, note. Purchaser of an unindorsed promissory note, payable to order, acquires title to such note, but not the rights of a *bona fide* holder: *Moore v. Miller*, 25 Am. Rep. 518; mere possession

of third party of such note is not even *prima facie* evidence of title in holder as against payee: *Vastine v. Wilding*, 100 Am. Dec. 347. Holder of a note payable to order, and indorsed in blank, may maintain suit: *Johnson v. Mitchell*, 32 Am. Rep. 602; *Kwaki v. Spooner*, 66 Am. Dec. 332. Note payable to the order of two persons who are not partners, and indorsed by one in the name of both, does not pass title of both: *Rymer v. Fillbert*, 34 Am. Rep. 130. As to rights of possessor of unindorsed negotiable paper not payable to bearer, see note to *Vastine v. Wilding*, 100 Am. Dec. 351. Agent may sue in his own name upon a negotiable note payable to order, indorsed in blank: *Pearce v. Austin*, 34 Id. 523. Pledgee may maintain action on an unindorsed note, held as collateral security in default of payment secured by note: *White v. Phelps*, 100 Id. 190. Indorsee can maintain action on note without proving consideration: *Knight v. Pugh*, 39 Id. 99.

SCARFF v. METCALF.

[107 NEW YORK, 211.]

SICK OR INJURED SEAMEN ARE ENTITLED TO BE CARED FOR AND CURED at the expense of the ship, and not to be turned adrift in strange lands without adequate provision.

OWNERS OF SHIP ARE ANSWERABLE FOR NEGLIGENCE OF MASTER in rendering care or medical aid to sick or injured seamen.

NEGLECT OF MASTER OF VESSEL, whereby the mate was not properly cared for while injured, is not the neglect of a fellow-servant.

COST OF NURSING AND MEDICAL ATTENDANCE FOR SICK OR DISABLED SEAMAN FALLS UPON SHIP, although he may have been removed to his own house.

DAMAGES FOR INJURIES TO SICK OR INJURED SEAMAN, resulting from neglect of owners of ship, or of the master, as their representative, may be recovered by proceedings *in rem* against the vessel, or by action against the owner.

OWNERS OF VESSEL ARE NOT RELIEVED FROM LIABILITY FOR NEGLIGENCE TO SICK OR INJURED SEAMAN by an agreement with the master to sail the vessel on the shares, he to man the vessel, victual the crew, and pay the running expenses for one half of the gross earnings. The owners can be relieved by nothing short of an actual demise of the vessel, such as takes from them all possession, authority, or control.

ACTION by Scarff against Yates and Metcalf to recover for injuries resulting from neglect of plaintiff while he was serving in the capacity of mate of a barkentine owned jointly by the defendants. Yates acted as master, and Metcalf claimed that he was not liable because of a contract whereby the vessel was sailed on the shares, as stated in the opinion. The cause was tried before a jury, who returned a verdict for plaintiff, and the judgment entered upon such verdict was affirmed on appeal to the general term. From such judgment of affirmance this appeal was taken.

Joseph A. Shouby, for the appellants.

William Sullivan, for the respondent.

By Court, FINCH, J. The verdict of the jury requires us to adopt the plaintiff's version of the facts, since the judgment was in his favor, and the negligence of the master thereby established. If that judgment was against him alone, very little question would arise; but it involves another owner, not on board the vessel, but remaining at home, and so situated in his relation to the facts as to make necessary their careful consideration.

The barkentine upon which plaintiff was injured, while employed as mate, was owned by defendants. She was sailed by defendant Yates as master, on shares, by virtue of an agreement with the other owners to that effect. The agreement was not in writing, and is detailed solely by the two owners, each of whom testified to its existence. The vessel started on a voyage to Sagua la Grande, in Cuba, and when some distance at sea the plaintiff received an injury in the performance of his duty, which developed into an aneurism of the popliteal artery, causing him great pain, and largely incapacitating him for active service. The vessel was provided with a proper medicine-chest, and no complaint is made that, before arriving at the port of destination, the master treated his mate otherwise than with kindness and care, and with such means as his limited knowledge and opportunity enabled him to use. But on reaching port, and consulting a physician, it was made apparent to the master that surgery, and not medicine, was needed to cure the injury.

At this point of the case, the contradictions become plentiful, but we must assume, in support of the verdict, that the doctor consulted disclosed the true nature of the disease; that he advised the removal of the injured man to the hospital, about fifteen miles distant, or at least to a suitable place on shore; that he pronounced it dangerous to carry the mate back to New York without an operation, if a delay exceeding twelve days was involved; that the plaintiff requested a removal to the hospital or to the shore, with the provision usual in such cases, and necessary to his support; but that the master refused these requests, and kept him on board till the home voyage was begun and ended, and more than twenty days after the doctor's warning, landed the mate in New York, and placed him in a hospital, where amputation became neces-

sary, because of the long delay and destructive progress of the disease. It is of little consequence to the liability of Yates whether he be regarded as master or owner, for in either character the negligence was his, and drew with it a personal responsibility.

The maritime law is sensitive to the rights of seamen and sedulous for their protection. When sick or injured, they are entitled to be cared for and cured at the expense of the ship, and not to be turned adrift in strange lands without adequate provision. They are exposed to hardship, confronted with dangers, and grow occasionally reckless by their very familiarity with peril. The master's authority is quite despotic, and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That which on land would be contributory negligence the maritime law scarcely recognizes, and readily excuses: *The City of Alexandria*, 17 Fed. Rep. 390, 395; and in many ways throws its protection around the seaman. When he falls sick or suffers injury, the owners owe to him the duty of rendering such care and medical aid as circumstances permit, and in the performance of that duty the master stands as the agent and representative of the owners, and his negligence is theirs: *Petersen v. Swan*, 50 N. Y. 46; *The City of Alexandria*, *supra*; *Reed v. Canfield*, 1 Sum. 195; *Harden v. Gordon*, 2 Mason, 541, 543. The last-cited case considers the effect of the act of Congress requiring the ship to be supplied with a suitable medicine-chest, and holds that such requirement does not subvert the general duty imposed upon the owners by the maritime law, but merely regulates a single detail of its exercise. This duty the owners, who remain at home, and do not sail upon the ship, can only perform, beyond supplying the medicine-chest, through the master, who becomes their agent for its performance. The mate, although an officer, is a seaman: *Holt v. Cummings*, 102 Pa. St. 212; 48 Am. Rep. 199; *Ocean Spray*, 4 Saw. 105; *The Minna*, 11 Fed. Rep. 759. While both he and the master are servants of the owner, and so fellow-servants, they are not such in respect to the owners' duty to the seamen which the master performs in their behalf and as their representative, and the contention in this case that the master's neglect was that of a fellow-servant cannot prevail.

Where the duty of the owner to the seaman is performed, the cost of nursing and medical attendance falls upon the ship: *North America*, 5 Ben. 486; and that has been ruled even

where the patient had been removed to his own house: *Holt v. Cummings, supra.* But where that duty is not performed, and the seaman suffers injury from the neglect, the ship in a proceeding *in rem*, and the owners in a suit against them, are liable for the damages suffered: *Couch v. Steel*, 77 Eng. Com. L. 402; *Brown v. Overton*, 1 Sprague, 463; *Mosely v. Scott*, 14 Am. Law Reg. 599; *Tomlinson v. Hewett*, 2 Saw. 278; *Petersen v. Swan, supra.* These principles settle the liability of Metcalf, unless he is discharged by force of his arrangement with the master, to which attention must now be directed.

There is very much of authority for the doctrine that where there is a charter of the vessel which strips the owner of all authority, possession, and control, the charterer becomes owner *pro hac vice*, and the general owner ceases to be liable for the contracts or torts of the master, except for the wages of seamen. There seem to be limitations upon that doctrine, and doubts about it, although the main drift of authority is in that direction: *Hallet v. Columbian Ins. Co.*, 8 Johns. 272; *Thorp v. Hammond*, 12 Wall. 408; *Thomas v. Osborn*, 19 How. 22; *Reynolds v. Toppan*, 15 Mass. 370; 8 Am. Dec. 110. But I have arrived at the conclusion that this doctrine, even if broadly maintained, applies only to cases in which there has been an actual demise of the vessel, such as to take from the owner all possession, authority, and control, and not to cases where there has been merely a contract about the vessel for the division of earnings and expenses. There are cases which may justly be cited as not in accord with that conclusion: *Taggard v. Loring*, 16 Mass. 336; 8 Am. Dec. 140; *Cutler v. Winsor*, 6 Pick. 335; 17 Am. Dec. 385; but the current of authority in this state runs in its favor, and I am strongly convinced that it is sound in principle and just in its application. In *Hallet v. Columbian Ins. Co., supra*, there was an actual charter of the vessel, the owners receiving a stipulated price for its use. In *Thorp v. Hammond, supra*, the arrangement, although a letting on shares, is described by the court as, in effect, a chartering of the vessel, and a surrender by the owner of all authority and control. The case was one of collision, and largely affected by the terms and language of the act of Congress of 1851. In *Kenzel v. Kirk*, 37 Barb. 113, where the vessel was let to the master on shares, he to provide supplies, it was ruled that there was not a "positive chartering," and the owners were liable for supplies to a vendor ignorant of the arrangement. In *Macy v. Wheeler*, 30 N. Y. 241, it was said

that the liability for supplies depends, not on legal ownership, but possession and control. In *Vose v. Cockroft*, 45 Barb. 58, 60, there was a written agreement that the master should sail the vessel on shares in the customary way, he to man and provision her, pay one half of port charges and expenses and of extra labor, and have, "as wages," one half of the gross freight. This was held not to be a chartering of the vessel, and great force was given to the stipulation describing the master's share as "wages." In *McCready v. Thorne*, 49 Id. 438, there was a letting on shares, the master to victual, man, and sail the ship at his own expense, pay port charges out of earnings, and divide the balance equally with the owners. It was ruled that the master was not owner *pro hac vice*, and that the general owners were liable for unpaid port charges. A comparatively recent case in the English courts discusses the liability of the owner for the negligence of the master, where the relations between them were much like those in the case at bar: *Steel v. Lester*, L. R. 3 C. P. D. 121. Lester was owner, and Lilee was captain. It was agreed between them that Lilee should sail the ship wherever he chose, be at liberty to take or refuse any cargo, engage and pay the men, and furnish all requisite supplies, and give Lester one third of the net profits. While the vessel was unloading at its port of destination, under a charter-party made by the master, the wharf was damaged by the sloop through the negligence of Lilee, and Lester was sued for the damages. The court decided that the arrangement did not amount to a demise of the vessel, and was not such an absolute parting with it as would sever the control. These authorities indicate a distinction, which I am content to recognize, between an actual demise of the vessel, which transfers its possession, and all authority and control over it, and a mere arrangement for the sailing of the ship, which does not amount to a demise, and therefore leaves some possession, authority, and control in the owner, although narrowed and restricted by the terms of the agreement. Unless there is an actual demise of the vessel which destroys the relation of master and owner, and substitutes that of bailor and bailee, the relation must continue, and the master remain servant and agent of the owner.

Now, the arrangement between Yates and Metcalf was neither in form nor substance a demise of the vessel. The latter says that the captain sailed her on shares; that he, Metcalf, had nothing to do with the manning of the vessel or

victualing of the crew, and nothing to do with hiring the seamen or paying the running expenses; that the freight paid expenses, and the balance was divided up. The master testified: "I had an agreement with the owners to sail freight on what is known as shares, that is, I have half of the gross stock of earnings of the vessel, and pay for the victualing and manning of the vessel, and pay the tonnage out of my part of the gross earnings"; and he added that the owners had nothing to do with hiring the seamen, victualing them, or furnishing supplies. This seems to me but a mode of paying the master for his services. It was not said that he should dictate the voyages, decide as to cargo, fix rates of freight, and absolutely control the vessel to the exclusion of Metcalf. Indeed, it appears that she was consigned to Metcalf, and that he exercised some authority over her. His dividend from her earnings was increased by the very saving of expenses which the master affected at the risk and to the injury of the mate, and I am unable to resist the conclusion, in spite of the very learned and interesting argument for the appellants, that the judgment was correctly given against both the owners.

The judgment should be affirmed.

Judgment affirmed.

DUTIES OF SHIP-OWNERS TO SEAMEN IN THEIR EMPLOY. — *As to Seaworthiness of Vessel.* — According to the English law, there is no implied warranty of seaworthiness in a contract between an owner of a ship and a seaman to serve on board of it for a particular voyage: *Couch v. Steel*, 3 El. & B. 402; 24 Eng. L. & Eq. 77. But the American law is otherwise, and the ship-owner, among other obligations to the seamen, is bound to provide a seaworthy ship. Both law and reason imply that at the commencement of the voyage the vessel should be seaworthy, which means that it should be furnished with all necessary and customary requisites for navigation, including a competent crew: *Dixon v. Ship Cyrus*, 2 Pet. Adm. 407; *Rice v. The Polly and Kitty*, 2 Id. 420; *The Gentleman*, Olcott, 115; *The Ship Moslem*, Id. 289; *Putnam v. Hood*, 3 Mass. 481; *The Planter*, 2 Woods, 490; *Halverson v. Nissen*, 3 Saw. 562. And if seamen have reason to believe, and do believe, that a vessel is unseaworthy before the commencement of the voyage, they may lawfully refuse to go to sea in her: *United States v. Ginnings*, 1 Sprague, 75; *United States v. Nye*, 2 Curt. 225; *United States v. Ashton*, 2 Sum. 13; or if, after commencing the voyage, they become apprehensive of great danger from unseaworthiness, it is not mutinous in them, in a body, to apply respectfully to the officers and urge that the ship be put back to port: *The Moslem*, Olcott, 289; *United States v. Staly*, 1 Wood. & M. 338. But while seaworthiness includes a competent crew, yet the owner does not warrant to each seaman the competency of the others, all alike being engaged in the common employment of navigating the ship: *Dixon v. The Cyrus*, 2 Pet. Adm. 411; *The Ward Jr.*, 20 Fed. Rep. 702 (La.); nor is the owner an

insurer or warrantor of the seamen against latent and undiscoverable defects in the ship: *The Lizzie Frank*, 31 Fed. Rep. 477 (Ala.); and see *Riley v. State Line Steamship Co.*, 29 La. Ann. 791; 29 Am. Rep. 349. If a vessel is constructed and equipped in the mode usual and customary with other vessels of like character, and in a mode approved by competent judges and previous experience, then, in case of an accident happening by reason of a latent defect in the equipment and construction, there is no negligence or fault on the part of the owner: *The Lizzie Frank*, 31 Fed. Rep. 477 (Ala.); *The Rheola*, 22 Blatchf. 124; *The Harold*, 21 Fed. Rep. 428 (N. Y.); and see *Sunney v. Holt*, 15 Id. 880 (Ohio). The owners having performed all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for the accidents to seamen which happen during the voyage, beyond the limits which the maritime law has established: *The City of Alexander*, 17 Id. 390 (N. Y.).

As to Provisions. — Proper subsistence is likewise a part of the contract between ship-owners and the seamen in their employ: *Foster v. Sampson*, 1 Sprague, 182; *The Mary Paulina*, 1 Id. 45. And seamen may maintain an action for the recovery of damages sustained by them from the willful or negligent conduct of the master or owners in respect to a sufficient supply of good provisions: *Collins v. Wheeler*, 1 Sprague, 188; and see *United States v. Mitchell*, 3 Wash. C. C. 95. And it is no defense to such an action against the owners that the injuries were caused by the master's default. The owners are responsible for the direct consequences of any wrong-doing of the master, which is done by him as master, in the discharge of his duty, and under the authority given him as master: *Baxter v. Doe*, 142 Mass. 558. What is proper subsistence, such as the owners are bound to furnish the seamen, depends upon what is usual in similar voyages: *Foster v. Sampson*, 1 Sprague, 182.

In Case of Sickness or Injury. — That seamen in the service of a ship are entitled to be cured at the expense of the ship, is a well-established rule in the maritime law: See *Somerville v. The Francisco*, 1 Saw. 393; *Neilson v. The Laura*, 2 Id. 244; *The Ocean Spray*, 4 Id. 105; *The Nimrod*, 1 Ware, 9; *Sullivan v. The Neptune*, 30 Fed. Rep. 925 (N. Y.); *The City of Alexandria*, 17 Id. 390 (N. Y.); *Holt v. Cummings*, 102 Pa. St. 212. And the charge on the ship includes not only medicines and medical advice, but nursing, diet, and lodging, if the seaman be carried ashore: *Brunet v. Taber*, 1 Sprague, 243; *Reed v. Canfield*, 1 Sum. 195; *Harden v. Gordon*, 2 Mason, 541; *The Brandywine*, 1 Newb. Adm. 5; *Holt v. Cummings*, 102 Pa. St. 212. So far as expenses are incurred in the cure, whether they are of a medical or other nature, such as for diet, lodging, nursing, or other assistance, they are a charge on and to be borne by the ship. The seaman is entitled to be healed at the expense of the ship, even after the voyage has terminated, and he has been discharged: *The Lizzie Frank*, 31 Fed. Rep. 477 (Ala.); *The W. L. White*, 25 Id. 503 (N. Y.). And where the owners fail in the performance of their duty to render such care and medical aid to a sick or injured seaman as the circumstances permit, and the seaman suffers injury from the neglect, the ship in a proceeding *in rem*, and the owners in a suit against them, are liable for the damages suffered: *Brown v. Overton*, 1 Sprague, 463, and other cases cited to this point in the principal case; see also *Sullivan v. The Neptune*, 30 Fed. Rep. 925 (N. Y.). Under the statutes of the United States, the ship is required to have on board a chest of medicines: See U. S. R. S., secs. 4569, 4570; but there is no law requiring the presence of a physician or surgeon. In the absence of a

physician or surgeon, in case of an injury to a seaman while in the service of the ship, it is the duty of the master to act according to his best judgment, and if he is not fully competent to follow the directions contained in the medicine-chest, he is to extend such relief as under all the circumstances is reasonable, until regular medical advice can be procured with reasonable dispatch: *Petersen v. Swan*, 21 Jones & S. 151; and see *Stocker v. The Vigilant*, 30 Fed. Rep. 288 (N. Y.). But a mere error of judgment on his part, although it may be a grave one, is not equivalent to negligence: *Petersen v. Swan*, 21 Jones & S. 151.

When a sick seaman abandons the service, he is held to relinquish his right to be cured at the ship's expense: *The Cambridge*, 4 Saw. 252. But such right is not taken away or limited by the acts of Congress (U. S. R. S., secs. 4585, 4903), providing for the collection from vessels of a certain sum per month for each seaman, as a fund for the relief of sick and disabled seamen, and appropriated for the expenses of the marine hospital service. The provisions of said acts must be treated as simply auxiliary to the provision of the maritime law: *Holt v. Cummings*, 102 Pa. St. 212. So the statutory requirement that the ship be supplied with a suitable medicine-chest does not subvert the general duty imposed upon the owners by the maritime law, but merely regulates a single detail of its exercise: *Harden v. Gordon*, 2 Mason, 541. Moreover, this right of the seaman to medical care, nursing, and attendance, and to cure, so far as cure is possible, at the expense of the ship, is without reference to any question of ordinary negligence of himself or his associates, and is neither increased nor diminished by the one or the other: *The City of Alexandria*, 17 Fed. Rep. 390 (N. Y.); and see *Cornwall v. The New York*, 34 Id. 757; *The Mabel Comeaux*, 24 Id. 490 (La.). The only qualification arises from the willful and gross misconduct of himself or associates, in which case it is held that the expense may be charged against the wages of the wrong-doer: *The City of Alexandria*, 17 Id. 390 (N. Y.); and see *Johnson v. Huckins*, 1 Sprague, 67; *The Nimrod*, 1 Ware, 9; *Reed v. Canfield*, 1 Sum. 195. And in suits in admiralty to recover damages on account of personal injuries, contributory negligence on the part of the libellant is not a bar to his recovery. Where the fault which caused the injury is concurrent or mutual, courts of admiralty will apportion the damages, or give or withhold them in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the particular case: *Atlee v. Packet Co.*, 11 Wall. 389; *The Wanderer*, 20 Fed. Rep. 140 (La.); *The Explorer*, 20 Id. 135 (La.); *Curry v. The Max Morris*, 28 Id. 881, and note 886 (N. Y.); *The Daylesford*, 30 Id. 633 (Ala.); *Olson v. Flavel*, 34 Id. 477.

Where Ship is Sailed by Master "on Shares."—It has been held that where a vessel is let to a master on shares he is owner for the voyage, and liable for supplies: *Kenzel v. Kirk*, 37 Barb. 113; affirmed 2 Abb. App. 500; *Lyman v. Redman*, 23 Me. 289; *Webb v. Peirce*, 1 Curt. 104. In such case it is held that he is not the agent or servant of the owners: *Master v. Holmes*, 10 Met. 462; *Bonney v. Hodgkins*, 55 Me. 98; *Tucker v. Stimson*, 12 Gray, 487; and that the owners cannot be held liable for damages occasioned by a collision happening through the fault or negligence of the master, who controls the vessel *pro hac vice*, and is sailing her on shares: *Somes v. White*, 65 Me. 542; 20 Am. Rep. 718; and see *Thorp v. Hammond*, 12 Wall. 408. It was, however, held in *Petersen v. Swan*, 21 Jones & S. 151, following the former decision in the same case, 18 Id. 46, that if the plaintiff, who was a seaman on board of a vessel of which the defendant was part owner, and was

injured while in such service, was negligently treated by the master, the fact that the master sailed the vessel on what is known as "shares," so long as this did not involve an entirely independent command, constituted no defense to such owner. This decision is founded upon the ruling in the principal case, and is likewise sustained by the English case of *Steel v. Lester*, L. R. 3 Q. P. D. 121.

LAUBHEIM v. DE K. N. S. Co.

[107 NEW YORK, 223.]

WHERE STEAMSHIP COMPANY BECOMES BOUND BY LAW OR BY CHOICE TO PROVIDE SURGEON FOR ITS SHIPS, its duty to passengers demands the selection of a reasonably competent man for that office, and it is liable for a neglect of that duty. But the company is responsible solely for its own negligence in the selection of a surgeon, and is not liable for the negligence of the surgeon employed.

APPEAL from a judgment of the general term of the superior court of the city of New York, which affirmed a judgment in favor of the defendant. The action was one for the recovery of damages for injuries resulting from alleged negligence. The plaintiff was a passenger on a steamship of the defendant company, and when at sea she fell on deck and fractured the knee-cap of one knee. She was treated by the ship surgeon, but, as was claimed, in such a negligent manner that after landing amputation of the leg was necessary. The evidence showed that the ship surgeon had been on the defendant's steamships for some years, receiving an annual salary, and a certain sum for each passenger carried.

A. Blumenstiel, for the appellant.

S. W. Rosendale, for the respondent.

By Court, FINCH, J. It is not necessary in this case to determine whether, at the date of the accident to the plaintiff, the steamship company owed a duty to its passengers to provide a surgeon for their care and safety in the emergency of sickness or accident, or whether, having voluntarily assumed that duty, its position became identical with that of a carrier bound by law to furnish such an officer, since either proposition may be granted without involving error in the judgment rendered.

If by law or by choice the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty: *Chapman v. Erie R'y Co.*,

55 N. Y. 579; *McDonald v. Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Secord v. St. Paul R. R. Co.*, 18 Fed. Rep. 221. It is responsible solely for its own negligence, and not for that of the surgeon employed. In performing such duty, it is bound only to the exercise of reasonable care and diligence, and is not compelled to select and employ the highest skill and longest experience.

There was no evidence in this case that the defendant was careless or negligent in its choice. The surgeon selected had been upon the Rotterdam line for three years, and so far as appears was reasonably competent for his duty. If in plaintiff's case he erred in his treatment, it does not prove that he was incompetent, or that it was negligence to appoint him. This case shows that one doctor of high reputation may deem it unwise ever to wire a broken knee-cap, while another of equal ability thought it prudent to try the experiment. The experts, called for the plaintiff decline to say that the ship's doctor subjected the injury to bad treatment, taking into view the inconveniences of a tossing ship and the impossibility of giving absolute rest to the limb. This branch of the plaintiff's case failed, and the trial court was justified in a dismissal of the complaint.

The judgment should be affirmed.

Judgment affirmed.

THAT RAILWAY CORPORATION EMPLOYING PHYSICIAN is not answerable for his negligence, if he is a competent physician, was asserted in the charge to the jury in *Secord v. St. Paul R. R. Co.*, 18 Fed. Rep. 221.

HODGE v. SLOAN.

[107 NEW YORK, 244.]

CONTRACT IN RESTRAINT OF TRADE IS VALID, if it imposes no restriction upon one party not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it.

COVENANT BY OWNER OF LAND TO USE OR TO ABSTAIN FROM USING IT, in such a manner as the other party to the contract specifies, will be enforced in equity against the grantees of the original covenantor.

AGREEMENT BETWEEN GRANTOR AND GRANTEE, THAT LATTER WILL NOT SELL ANY SAND OFF OF PREMISES conveyed to him by the former, will be enforced in equity against the grantee and his successors in interest, where it appears that the grantor exacted such agreement as a condition precedent to the sale, he being engaged in the business of selling sand from a tract of land of which the premises conveyed constituted but a small part.

ACTION by Edward Null to enjoin the defendants from selling any sand from a tract of land embracing about half an acre. In 1868 Null was the owner of forty acres of land in Canajoharie, and was engaged in the business of selling sand therefrom, and received an application from John D. Sloan, for the sale of the half-acre now in question. Null declined to sell on the ground that to do so would injure his business. To meet this objection, Sloan agreed not to sell any sand off the premises. This agreement was inserted in the original contract of sale; and, when after full payment was made, and a conveyance executed, it contained the following covenant: "Said party of the second part hereby agreeing not to sell any sand off of said premises." In 1881 Sloan conveyed to his son Richard, the defendant in the present action, who, notwithstanding his knowledge of the agreement made by his father, opened a pit on the premises and began selling sand therefrom. Null continued in the business of selling sand, and was able to supply all demands therefor. He brought this action to enjoin the defendant from the sale of sand from the premises conveyed as before set forth. During the pendency of the action Null died, and the action was continued in the name of his executor, Hodge. The decisions at the special and general terms were both in favor of the defendant.

D. S. Morrel, for the appellants.

H. L. Huston, for the respondent.

By Court, DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice, for it takes from one party an advantage which he refused to sell, and secures to the other without price a privilege which his grantor was unable to buy. Nor do we find that this denial of private right is required by any rule of public policy. Assuming with the respondent that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it,—or in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. This is the doctrine of *Chappel v. Brockway*, 21 Wend. 157, and *Ross v. Sadgbeer*, 21 Id. 166, derived by a learned court from the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and an examination of subsequent decisions. It is also so am-

plified and discussed in a case just decided by this court, *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, opinion by Andrews, J., as to make any elaboration of the general rule quite superfluous.

The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy and which the plaintiff was willing to sell, provided it should not be made an instrument for the destruction of his means of livelihood, or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools, or instruments, or means by which he gains the support of his family; or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him upon a sale of the instrument to consent to that use, or prohibits him from binding his vendee against it.

We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way, and in order to do this it was necessary that he should preclude himself from so using it as that by its means he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right with which the question of public policy has little if anything to do.

Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound.

The contract was good between the original parties, and it should in equity, at least, bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice, as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title. It is enough that a purchaser has notice of it. The question in equity being, as is said in *Tulk v. Moxhay*, 11 Beav. 571, 2 Phill. Ch. 774, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in *Tallmadge v. East River Bank*, 26 N. Y. 105, where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted.

In *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615, the action was brought to restrain the carrying on of business on certain premises in the city of New York, of which the defendant was owner, upon the ground that the premises were subject to a covenant, reserving the property exclusively for dwelling-houses. The court below held, among other things, that the covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed, the covenant held to be binding upon a subsequent grantee with notice as well upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon "shall be used for the sale of ale, beer, spirits," etc., "or as an inn, public house, or beer-house": *Carter v. Williams*, L. R. 9 Eq. Cas. 678. And it is said a man may covenant not to erect a mill on his own lands: *Mitchel v. Reynolds*, *supra*.

Many other instances of restraint might be referred to, and where it is of such nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or certain kinds

of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice: *Parker v. Nightingale*, 6 Allen, 341, 344; 83 Am. Dec. 632; *Burbank v. Pillsbury*, 48 N. H. 475; nor is it essential that the assignees of the covenantor should be named or referred to: *Morland v. Cook*, L. R. 6 Eq. Cas. 252. In *Tulk v. Moxhay*, 1 Hall & T. 105, it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of land, which was conveyed to him in fee-simple, covenanted with the vendor that the land should be used and kept in ornamental repair as a pleasure garden, and it was held that the vendor was entitled to an injunction against the assignee of the purchaser to restrain them from building upon the land. Upon the appeal, the chancellor, Cottenham, said: "I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course, upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of his jurisdiction to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed." The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. "Of course," he says,— "of course the party purchasing the property which is under such restriction gives less for it than he would have given if he had bought it unencumbered. Can there, then, be anything much more inequitable or contrary to good conscience than that a party who takes property at a less price because it is subject to a restriction should receive the full value from a third party, and that such third party should then hold it unfettered by

the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding." And in language very applicable to the case before us he adds: "Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk." This case is cited and followed as to restrictive covenants in many cases: *Brown v. Great East. R'y Co.*, L. R. 2 Q. B. D. 406; *London etc. R'y Co. v. Gomm*, L. R. 20 Ch. Div. 562, 576. Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement or refused, according to its discretion: *Trustees v. Thacher*, 87 N. Y. 311; but where the agreement is a just and honest one, its judgment should not be in favor of the wrong-doer. Such seems to us the character of the covenant in question; it is restrictive, not collateral to the land, but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded.

Brewer v. Marshall, 19 N. J. Eq. 537, is cited by the respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case. But in the opinion of the court, it was not one for the interference of a court of equity. Among many other cases, *Tulk v. Mozhay*, *supra*, is cited, and the learned court say: "It will be found, upon examination, that these decisions proceed upon the principle of preventing a party, having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements, or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point"; and from a "review of the authorities," the court say "it is entirely satisfied that a court of equity will sometimes impose the burden of a covenant, relating to lands, on the alienee of such lands, on a principle altogether aside from the existence of an easement, or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was, whether the covenant then in controversy was embraced within the proper limits of

this branch of equitable jurisdiction. By a divided court an injunction was denied. The circumstances were quite unlike those before us, and the decision furnishes no precedent for us to follow.

The judgment appealed from should be reversed, and new trial granted, with costs to abide the event.

All concur except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting, because, in their opinion, the covenant was a personal one, and did not bind the grantee of the land.

Judgment reversed.

CONTRACTS IN RESTRAINT OF TRADE: See note to *Angier v. Webber*, 93 Am. Dec. 751-765; *Smalley v. Green*, 35 Am. Rep. 267, and note 269-272; *Diamond Match Co. v. Roeber*, 60 Id. 464; *Washburn v. Dosch*, 60 Id. 873.

AGREEMENTS NOT TO USE REAL PROPERTY for certain specified purposes, entered into upon sufficient consideration, may be enforced in equity, by and against the parties and their successors in interest: *Trustees v. Lynch*, 26 Am. Rep. 615, where the owners of adjacent lots agreed with each other that such lots should never be used for any business or public purpose whatsoever; *Atlantic Dock Co. v. Leavitt*, 13 Id. 556, where a deed was accepted containing a covenant that the grantee, his heirs and assigns, would not erect any distillery on the land conveyed; *Dorr v. Harrahan*, 3 Id. 398, where a conveyance contained a restriction that none but a dwelling-house shall be erected on the premises; see also *Parker v. Nightingale*, 83 Am. Dec. 632, and note to *Cross v. Carson*, 44 Id. 751.

NEW YORK RUBBER Co. v. ROTHERY.

[107 NEW YORK, 810.]

TO CREATE EQUITABLE ESTOPPEL, the person sought to be estopped must do some act or make some admission to influence the conduct of another, which act or admission is inconsistent with the claim he proposes now to make; and the other party must have acted on the strength of such act or admission.

SILENCE DOES NOT CREATE ESTOPPEL, unless there was a duty to speak. ESTOPPEL. — Riparian proprietor, seeing proprietors on the opposite side of the stream building a mill-race to be used for the purpose of taking water out of the stream to supply a shop or factory, and not to be returned to the stream until after it passes his land, is not, by his failure to object to such mill-race during its construction, estopped from subsequently objecting thereto, and maintaining an action for damages occasioned thereby.

ACTION for damages. Plaintiff's predecessor in interest, Ruth J. Smith, and the defendants, were riparian proprietors, whose lands were situate on the opposite sides of a stream. De-

defendant dug on his land a mill-race, to supply water to his factory. It diverted water from the stream, which was not returned thereto until after it passed plaintiff's land. Verdict and judgment for defendant.

H. B. Turner, B. F. and W. H. L. Lee, for the appellant.

H. H. Hustis, for the respondents.

By Court, PECKHAM, J. The defendants claim two answers were made to the plaintiff's case, each of which was fatal to a recovery herein.

One answer was, that the use made by the defendants of the water in the stream was not unreasonable or illegal, or in any way inconsistent with the rights of the plaintiff. The defendants say that plaintiff's lots are on the opposite side of the stream from their land, and that no machinery can be placed on the lots to be propelled by water, as plaintiff has no land upon which to erect a dam, and there is no fall in the stream between the bridge and defendants' tail-race, so that the only use the plaintiff could have for the water in the stream is for domestic purposes, and there being, as they claim, always water in the stream by the plaintiff's lots for such purposes, its rights as a riparian owner have not been injured.

The difficulty with this statement is, that there is evidence in the case which tends to contradict it, and which tends to show that the use made by the defendants of the water in the creek was such that at various times the quantity which would otherwise have flowed past plaintiff's lots was perceptibly and materially diminished, and to such an extent that frequently when the water was running through the tail-race of defendants there was none running over or through the dam except leakage, and of course none flowing past the plaintiff's lot, the whole substantial part of the water of the stream going through defendants' tail-race, instead of down its original and natural channel. There is evidence tending to show that the water was not returned to the stream in time to reach that part of the plaintiff's lot which it would otherwise naturally touch.

We do not assume to say this evidence is true. But it raised an issue which the plaintiff was entitled to have decided by the jury, unless there was some other defense to the action. There cannot be much dispute now as to the general rights of riparian owners, or that if the defendants did use the water to such an extent as some of the evidence tends to prove, they

used it in a manner that they had no legal right to do. Whether they did or not, we do not know. The other answer which the defendants make is that of an equitable estoppel.

It may be assumed that at the time when the defendants built their mill-race, and erected expensive buildings for manufacturing purposes, Ruth J. Smith was the owner of the lots in question, and which are now owned by the plaintiff.

The estoppel is based upon the following facts: The defendants built the mill-race upon their own lands, and erected their factory also upon their own lands, which factory was to be supplied with water from the stream carried through this mill-race. While Ruth J. Smith was thus the owner of the lots, and while the defendants were building this mill-race on their own lands, she saw defendants and their men at work on it and on the factory, and she understood the race was being built to take water from the stream to the shop; and during all the time it was in course of construction she never objected to it in any way, or authorized any one to object to it for her, nor did she at the time object to the defendants carrying the water down the race.

These are all the facts upon which an estoppel is claimed, and upon which the learned courts below decided that an estoppel existed. They are not sufficient to authorize the presumption of a grant, or even a license: *Haight v. Price*, 21 N. Y. 241; and defendants must rest their defense upon an estoppel pure and simple. It will be seen there is no element of fraud in the case, nor any evidence that Mrs. Smith led the defendants into making this outlay on any assumption that they had the right to do it, when in truth they had not, and she knew it, and yet induced them to go on and expend their moneys upon such erroneous assumption. Nothing of the sort is pretended. The simple case is presented of an owner of land standing by and seeing an owner of adjoining land make such use of his own land as he had a right to, without informing him that if he proceeded thereafter to do an illegal act it would not be permitted. The defendants had a right to excavate on their own land, and to build such a factory as they chose, but even if they had no right to dig the mill-race, and let the water in it, and thus, possibly, divert the water from the stream, the owner of the adjoining land (Mrs. Smith) was not bound to interfere or protest. She had the legal right to acquiesce in the action of the defendants, so far as to refrain

from interference, and her simple knowledge that defendants were thus engaged did not require her to object, under penalty of the loss of her legal rights. The cases referred to by counsel for respondents to sustain the estoppel in this instance do not go to any such length, and I have been unable to myself find any that do.

The counsel referred to *Town v. Needham*, 3 Paige, 545; 24 Am. Dec. 246; *Thompson v. Blanchard*, 4 N. Y. 303; *Brown v. Bowen*, 30 Id. 519; 86 Am. Dec. 406; *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191. The first case, that of *Town v. Needham*, *supra*, simply enforced the well-settled rule of equity, that where the owner of real estate suffers another to purchase the estate from a third person, and to erect buildings thereon, under the erroneous belief that he has a good title, and such owner permits the purchaser to conclude his purchase, and intentionally conceals from him his title to the property, the owner will not afterwards be permitted to enforce his title against such purchaser. In *Thompson v. Blanchard*, *supra*, the same doctrine is held applicable to personal property. *Brown v. Bowen*, *supra*, holds the same principle, the same element of concealment on one side and mistake of fact on the other being present. To the same effect is *Trenton Banking Company v. Duncan*, 86 N. Y. 221. The English rule is substantially the same: *Ramsden v. Dyson*, L. R. 1 H. L. Cas. 129. *Corning v. Troy Iron and Nail Factory*, *supra*, is really an authority for the position taken by the plaintiff here, that no estoppel can be predicated upon the facts in this case.

There is no pretense that the defendants did not know their title and their rights quite as well as Mrs. Smith, and none that she in any way induced them to make this expenditure. She was simply passive in the matter, and failed to object to the defendant's doing what they did do. In this there was no element of an estoppel. To constitute it, the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct: See *Brown v. Bowen*, *supra*, at page 541. In cases of silence, there must be not only the right but the duty to speak before a failure so to do can estop the owner. There was no such duty here: See *Viele v. Judson*, 82 N. Y. 32.

The judgment of the general term and of the circuit should be reversed, and a new trial granted, costs to abide event. Judgment reversed.

ESTOPPEL. — One who, having knowledge of his rights, encourages another to buy, or to settle upon and improve, land is estopped thereby from claiming title for himself: *Miller v. Miller*, 100 Am. Dec. 538; *Tongue's Lessee v. Nutwell*, 79 Id. 649; *Workman v. Guthrie*, 72 Id. 654; *Saunderson v. Ballan*, 72 Id. 218; *Gaffey v. O'Reilly*, 57 Am. Rep. 424, and note 429-433. So it has been held that one who permitted a quasi public improvement, as a railway, to be constructed on his land, without objection, is estopped from denying the right to use the land for railroad purposes, though not precluded from collecting compensation: *Goodin v. C. & W. C. Co.*, 98 Am. Dec. 95, and note; *Anderson v. Hubble*, 47 Am. Rep. 394, and note.

McPHERSON v. ROLLINS.

[107 NEW YORK, 816.]

PURCHASERS OF LAND MUST BE DEEMED TO HAVE EXAMINED every deed and instrument on record affecting their title, and to have notice of every fact disclosed by the record, and every other fact which an inquiry suggested by these records would have led up to.

RELEASE BY MORTGAGEE OF MORTGAGE WHICH HE HOLDS IN TRUST FOR ANOTHER, before it becomes due, is in contravention of his trust, and constitutes no obstacle to enforcing such mortgage against subsequent *bona fide* purchasers. They are bound to know that he had no authority to grant such release.

FORECLOSURE. Defense as to the defendant Rollins that the mortgage had been discharged of record before they purchased, and that they were innocent purchasers for value. The mortgage was executed by Fannie Gray to Andres Deming, and it recited that it was "intended as a security for the payment of \$250 annually to said Deming for and during his natural life, on or before the fifteenth day of May, in each year thereof, reckoning from the date of this mortgage; and for the further payment of the further sum of \$50 annually to said Deming, or the general guardian of Florence McPherson, on or before the fifteenth day of May in each year hereafter, for the benefit of said Florence, until the said Florence shall arrive at the age of fifteen years, and the further sum annually to said Deming or guardian of \$100, payable on or before the fifteenth day of May in each year, until the said Florence shall arrive at the age of twenty-one years, for the benefit of said Florence; and for the further payment of the further sum of \$50 annually to the said Deming or

the general guardian of Ida McPherson, on or before the fifteenth day of May in each year hereafter, for the benefit of said Ida, until the said Ida shall arrive at the age of fifteen years; and thereafter the further sum annually to said Deming or guardian of \$100, payable on the fifteenth day of May in each year, until the said Ida shall arrive at the age of twenty-one years, for the benefit of said Ida; said Florence and Ida being the granddaughters of the said Deming, the said Florence being fourteen years of age April 1, 1873, and the said Ida eleven years of age October 10, 1872." The mortgage was properly executed and recorded. Several months thereafter, the mortgagor requested Deming, the mortgagee, to enter satisfaction of the mortgage of record, and he complied with the request, without in fact receiving anything in payment. The mortgaged premises were afterwards sold and conveyed to the defendants, who were purchasers in good faith, and for value, and without any actual notice of the mortgage, or of the manner in which its satisfaction of record had been procured. Judgment for plaintiff on the report of a referee was affirmed by the general term, from which the defendant appealed.

E. A. Nash, for the appellant.

A. J. Abbott, for the respondent.

By Court, DANFORTH, J. That a valid trust was created by the terms of the mortgage, and to the effect as found by the referee, and that it continued to exist, there can be no doubt. The transfer of property was executed, and the relation of trustee and *cestui que trust* formed, and at no time renounced. This question must be deemed closed in this court by its decision in *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. The important inquiry before the referee was, whether the defendants had any notice, actual or constructive, of the plaintiff's rights, or of the character in which Deming held the mortgage. His finding that they had no actual notice reduces our inquiry to the effect of the recording act. As intending purchasers, they must be presumed to investigate the title, and to examine every deed or instrument forming a part of it, especially if recorded. They must therefore be deemed to have known every fact so disclosed: *Acer v. Westcott*, 46 N. Y. 384; 7 Am. Rep. 355; and every other fact which an inquiry, suggested by those records, would have led up to. Thus they are plainly chargeable with notice of the mortgage, and of all the facts of which

the mortgage could inform them. They knew, therefore, that the legal interest was in Deming, and that, to some extent, he was the owner of a beneficial interest. As to that, they might rely upon his acts. How was it as to the plaintiff? The mortgage declared that it was intended as security for the payment of \$250 annually to Deming, individually, and \$50 annually to "Deming, or to the general guardian of Florence McPherson [the plaintiff], on or before the fifteenth day of May in each year hereafter, for the benefit of said Florence, until the said Florence shall arrive at the age of fifteen years, and thereafter, the further sum annually to said Deming or guardian of \$100, payable on or before the fifteenth day of May in each year, until the said Florence shall arrive at the age of twenty-one years, for the benefit of said Florence"; and recited, also, that she was fourteen years of age on the 1st of April, 1873, being the same year in which the mortgage was executed. There was notice, therefore, that the plaintiff had a beneficial interest under the mortgage, which, by its terms, would continue until 1880, the time of her majority, and in like manner, although to a different period, as to the rights of Ida. It is true that at the same time the purchasers found of record a certificate, signed by Deming, dated February 6, 1874, referring in terms to this mortgage, and declaring that it "is redeemed, paid off, satisfied, and discharged."

But this was an act not in the execution of his trust nor warranted by it, and the referee properly held that, as against the plaintiff, it was of no effect. As to this, also, the purchasers must be presumed to have known the law. The case of *Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441, and other similar cases cited by the appellants, apply only where a trustee or guardian has a power of disposition of the estate, and may exercise it in his discretion. This power Deming did not possess. The discharge was in contravention of the trust, and therefore in fraud of the beneficiaries for whom the trust was created. By its very terms the mortgage was to be a security, not only for the payment of the money, but to remain such security for the payment of money at specific times during the plaintiff's minority. The defendants knew this, and knew also that the time when the trustee was authorized to receive payment had not arrived. His power was limited by the terms of the mortgage, and his apparent authority was his real authority. He had no power to vary its terms nor receive payment in anticipation of the times fixed by the mortgage. His

declaration or certificate that he had been paid was, therefore, of no avail against the express provisions of the instrument by which his power was defined. In case of default on the part of the mortgagor in paying, the mortgagee might, as the appellants say, foreclose, for power to do so is expressly given by the mortgage, but whether the security for future payments would then be found in the decree or otherwise would depend on circumstances not pertinent to the present inquiry. A point is made that the plaintiff is not the owner of a mortgage, and cannot maintain the action. Such question was not raised by the pleadings, nor does it appear to have been presented upon the trial, but the averments of the complaint show that the plaintiff is a real beneficiary. The form of the action is not objected to, and the judgment goes no further than to give the relief to which, as a beneficiary, she is entitled.

It should therefore be affirmed.

Judgment affirmed.

NOTICE FROM RECITALS IN TITLE PAPERS. — It is well settled that a purchaser is conclusively presumed to have notice of every fact which is disclosed by the records constituting the chain of title under which he holds: See note to *Lodge v. Simonton*, 23 Am. Dec. 48-51, in which note the general subjects of notice and of circumstances sufficient to put a purchaser upon inquiry are discussed. The subject of constructive notice is also treated in the note to *Parker v. Conner*, 45 Am. Rep. 184-190.

RELEASE OR CONVEYANCE BY TRUSTEE IN CONTRAVENTION OF HIS TRUST is void by the statutes of New York. Similar provisions have been incorporated in the statutes of other states. Under these statutes, reconveyances by the trustee to his grantor before the objects of the trust have been accomplished are invalid: *Briggs v. Davis*, 75 Am. Dec. 363, and note. Whenever the objects of the trust are expressed in the instrument creating it, every conveyance made by the trustee, in contravention of the trust, is ineffective, and leaves him vested with the legal title as before the execution of such conveyance: Note to *Gale v. Mensing*, 64 Id. 202, 203.

MANCHESTER v. BRAEDNER.

[107 NEW YORK, 346.]

PRESUMPTION FROM DELIVERY TO ANOTHER OF ORDER ON THIRD PERSON for the payment of money to the person to whom the order is given, is, that the drawee is indebted to the drawer in the sum mentioned in the order.

ACKNOWLEDGMENT IN WRITING SUFFICIENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS may consist of an order drawn by the debtor in favor of the creditor, and requesting a third person to pay the latter a sum named in such order.

ORAL EVIDENCE IS ADMISSIBLE TO IDENTIFY DEBT TO WHICH ACKNOWLEDGMENT, relied upon to take a demand out of the statute of limitations, relates.

WRITING, TO CONSTITUTE ACKNOWLEDGMENT SUFFICIENT TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS, must recognize the debt as existing, and contain nothing inconsistent with an intention on the part of the debtor to pay it.

ACTION commenced June 20, 1882, to recover for building material. Defense, the statute of limitations. To avoid this defense, the plaintiff proved that on June 21, 1876, the defendant gave him three orders on one Hoover, requesting him to pay plaintiff sums which in the aggregate equaled the amount of plaintiff's claim. Before any sum could become due from Hoover to be paid on such order, it was necessary for defendant to complete a certain job of work. This the defendant failed to do, and consequently Hoover never paid the order drawn on him, and the plaintiff's debt remained unsatisfied. Judgment in favor of plaintiff was affirmed by the general term.

P. L. Wilson, for the appellant.

Charles De Kay Townsend, for the respondent.

By Court, ANDREWS, J. When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is, that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying or securing the payment of his debt. In other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order, and a willingness on the part of the debtor to pay the debt. The transaction may be consistent with a different relation and another purpose, but in the absence of explanation, that is its natural and ordinary meaning: See *Bogert v. Morse*, 1 N. Y. 377.

The oral evidence shows that the defendant was owing the plaintiffs the amount specified in the several orders of June 21, 1876, and that they were given to secure the payment of the debt, thus fully corroborating the inferences deducible from the orders themselves. We think the orders constituted an acknowledgment in writing of the debt, within section 110 of the code, and continued the debt for the period of six years from their date. The decision is as to what is a sufficient acknowledgment of a debt, to take it out of the statute, are very nu-

merous, and not altogether harmonious. It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted: *Kincaid v. Archibald*, 73 N. Y. 189; *Lechmere v. Fletcher*, 3 Tyrw. 450; *Bird v. Gammon*, 3 Bing. N. C. 883; or to explain ambiguities: 1 Smith's Lead. Cas. 960, and cases cited. The promise to be inferred from the order was not conditional in the sense that the debt was to be paid only out of the fund in the hands of the drawee. At most, there was an appropriation of that fund for the payment of the debt, but the language of the orders did not import that the debt was to be paid only out of the fund against which they were drawn: See *Winchell v. Hicks*, 18 N. Y. 558; *Smith v. Ryan*, 66 Id. 352; 23 Am. Rep. 60. The defendant by his own act in abandoning the contract with Hoover, the drawee, prevented the payment of the orders, and left him subject to the general obligation of payment resting upon all debtors.

The judgment should be affirmed.

Judgment affirmed.

ACKNOWLEDGMENT OF DEBT SUFFICIENT to take it out of the statute of limitations: *Frey v. Kirk*, 23 Am. Dec. 581, and note; *McCormick v. Brown*, 95 Id. 170; *Harlan v. Bernie*, 76 Id. 428; *Landis v. Roth*, 58 Am. Rep. 747, and note 749-751; *Stewart v. Garrett*, 57 Id. 333, and note 334-336; *Norton v. Shepard*, 40 Id. 157, and note 160-162.

CALLANAN v. GILMAN.

[107 NEW YORK, 360.]

OBSTRUCTION TO STREETS IS ORDINARILY NUISANCE, if it interferes with their use by the public for travel and transportation. Abutting owner to street may temporarily encroach thereon by the deposit of building materials, if engaged in building. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of the street for public travel may be interfered with in a variety of other ways without creating a nuisance.

OBSTRUCTION OF STREETS CAN ONLY BE JUSTIFIED BY NECESSITY, and even then it must be reasonable, with reference to the rights of the public, who have interests in the streets which may not be sacrificed or disregarded.

WHETHER OBSTRUCTION IN STREET IS NECESSARY AND REASONABLE is generally a question of fact.

APPROPRIATION OF STREET TO PRIVATE USE by one doing business thereon will not be permitted. The maintenance of a bridge across a sidewalk for hours during each business day, over which goods are conveyed to and from a store, is a public nuisance.

TO RECOVER FOR PUBLIC NUISANCE, plaintiff must allege and prove that he has sustained special damage, different from that sustained by the general public. Such special damage is sufficiently shown when it appears that the plaintiff has a store adjacent to the alleged nuisance, and that the nuisance prevents plaintiff, his employees and patrons, from reaching such store by passing along the sidewalk in front thereof.

OBSTRUCTION OF SIDEWALK CANNOT BE JUSTIFIED by showing that defendant allowed pedestrians to pass around or through his store, or over his elevated stoop, between moving barrels and packages.

FINDINGS ON IMMATERIAL ISSUES NEED NOT BE MADE.

FAILURE TO FIND ON MATERIAL ISSUES is no cause for reversal, when, from the undisputed evidence, the finding must have been against the appellant.

JUDGMENT ENJOINING OBSTRUCTION OF SIDEWALK should not prevent the defendant from making any use whatever of such obstruction, but should be limited to restraining him from "unnecessarily or unreasonably obstructing such sidewalk, or from unnecessarily or unreasonably hindering or preventing plaintiff, or his employees, servants, and customers, from having the convenient use of and passage along the sidewalk."

ACTION to enjoin the obstruction of a sidewalk. Judgment in favor of plaintiffs was affirmed by the general term.

Henry Schmitt, for the appellant.

John E. Parsons and Edwin M. Wright, for the respondents.

By Court, EARL, J. The primary purpose of streets is use by the public for travel and transportation, and the general rule is, that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule, born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance.

But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

In *Rex v. Russell*, 6 East, 427, where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said "that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." In *Rex v. Cross*, 3 Camp. 224, the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable-yard. . . . A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another." In *Rex v. Jones*, 3 Id. 230, the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable

time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber-yard; and if the street be too narrow he must move to a more convenient place for carrying on his business." In *Commonwealth v. Passmore*, 1 Serg. & R. 217, the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city, and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: "It is true, necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute: it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. . . . I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street because it saves the expense of storage. But there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business."

In *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709, the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which

may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in Russell's case, above cited. 'They must either enlarge their premises, or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest of the community." In *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698, a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right, to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk." In *Mathews v. Kelsey*, 58 Me. 56, the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."

Now, what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers, having stores near to each other on the south side of Vesey Street in the city of New York; and a large portion of the plaintiffs' customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk, and then a bridge, made of two skids planked over so as to make a plank-way three feet wide and fifteen feet long, with side pieces three and one half inches high, was placed over the sidewalk with one end resting upon the stoop of the defendant's store, and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the

inner end about twelve inches, and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half, and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of 9 o'clock A. M. and 5 P. M., and that it obstructed the sidewalk the greater part of every business day.

Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation, by the defendant, of the sidewalk in front of his store to his private use, in disregard of the public convenience. Even if, in some sense, such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more, and even less, than it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing, and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place, or enlarge his premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck; and this he could do at intervals during the day, at no one time obstructing the street for any considerable length of time. But there is no authority, and no rule of law, which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was therefore guilty of a public nuisance.

But the defendant claims that the plaintiffs did not allege in their complaint nor prove such special damage as entitled them to maintain this action. It is the undoubted law that the plaintiffs could not maintain this action without alleging

and proving that they sustained special damage from the nuisance, different from that sustained by the general public; in other words, that the damage they sustained was not common to all the public living or doing business in Vesey Street, and having occasion to use the same.

The plaintiffs did not demand any damages in their complaint, and none were awarded to them by the judgment. They simply demanded an injunction restraining the nuisance, and such was the judgment given to them. The complaint sufficiently alleges the special damages. It sets forth the location of the stores of the parties on the same side of the street, near to each other, the character of the bridge, which, when in use by the defendant, was only thirty-five feet from plaintiffs' store, and the manner and extent of the obstruction upon the sidewalk. From these facts alone, as they are fully set forth, it clearly appears that the plaintiffs suffered damage from the nuisance, which was not common to other persons having occasion to use the street. But the complaint goes still further, and distinctly alleges that the obstruction prevents "the plaintiffs and their employees or patrons, and all persons, from passing along said sidewalk to and from Church Street, and to and from plaintiffs' said store, to the detriment and great injury of plaintiffs and their said business"; that the obstruction had been maintained for more than six months prior to the commencement of the action on an average of five hours each day during the business hours of the day, "to the great and irreparable injury of the plaintiffs." While the complaint is not very definite as to the particular damage suffered by the plaintiffs, and the extent thereof, there is enough to show that they suffered some special damage; and if the defendant was not satisfied with the complaint in these respects, he should have moved to make it more definite, or for a bill of particulars. The defendant having taken issue upon the complaint, and gone to trial, it must be held sufficient to warrant the proof given.

The facts proved and found show special damage from the nuisance to the plaintiffs. There was some proof that some custom was turned from the plaintiffs' store on account of the obstruction, and that pedestrians were turned to the north side of the street before reaching plaintiffs' store. That the plaintiffs suffered some special damage not common to persons merely using the street for passage is too obvious for reason-

able dispute. Direct proof of the damage was not needed. All the circumstances show it.

It is further objected, on the part of the defendant, that some of the material findings of fact made by the trial judge were not upheld by any evidence. A careful scrutiny of the evidence fails to satisfy us that this objection is well founded. On the contrary, the undisputed evidence showed the nuisance, the special damage, and the right of the plaintiffs to a judgment restraining such nuisance. The evidence of the defendant was directed mainly to show that the bridge was necessary in his business, that skids and other similar appliances were in common use by merchants in the city, and that he left a passage-way for pedestrians on and over his stoop. The alleged necessity, as we have shown, furnished the defendant no justification for the nuisance, and it may be conceded that similar appliances are quite common in New York. It is not the nature of this appliance that furnishes the basis of our judgment, but its unreasonable use. The defendant could not justify his unreasonable obstruction of the sidewalk by showing that he allowed pedestrians to pass around or through his store, or over his elevated stoop, between moving barrels and packages. The stoop is no part of the sidewalk, and the defendant could not appropriate that to his private use and substitute his stoop for the public convenience. While temporarily obstructing the sidewalk, he should give pedestrians the best passage he can over his stoop. But this should be a temporary, not a permanent, shift. He cannot justify the obstruction of the sidewalk for hours because he gives the public a less convenient passage over his stoop.

The trial judge refused to make any findings upon certain questions of fact submitted to him, and this is now complained of as error. It is the duty of the trial judge to find upon every material question of fact submitted to him and involved in the evidence. But his refusal to do so will not be an error fatal to his judgment, if the findings asked were not material to the decision of the case, or would not be beneficial to the party asking them. Among the findings thus submitted on the part of the defendant were the following: "That the defendant uses the place complained of at a time and in a manner that is reasonable under all the circumstances"; "that the use of the sidewalk by the defendant does not unreasonably abridge or obstruct the passage of pedestrians." The judge should properly have found upon these questions; but

upon the undisputed evidence he should have found against the defendant, and therefore he has suffered no harm from the neglect or refusal to find. The facts proved by uncontradicted evidence, and found, showed that the obstruction was unreasonable. If the trial judge had responded to these findings in favor of the defendant, and had yet rendered judgment against him, the judgment would still have been based upon sufficient facts, and could not have been disturbed. The opinion and conclusion of the trial judge, notwithstanding the other facts found, that the obstruction caused by the defendant was not unreasonable, would not have been controlling and would not have sustained a judgment in favor of the defendant. Such a judgment would have been against the evidence.

But the judgment rendered is too broad and general in its terms. It is as follows: "That plaintiffs are entitled to an injunction perpetually restraining the defendant, his agents, servants, or employees, from obstructing the southerly sidewalk of Vesey Street, in front of the premises Nos. 35 and 37 Vesey Street, by any plank-way or bridge, or other like obstruction elevated above the sidewalk, and reaching from said store, or from the stoop in front of said store, to the roadway of said Vesey Street, or from hindering or preventing the plaintiffs, or their employees, servants, and customers, from having the free and unobstructed use of and passage along the sidewalk of said Vesey Street, in front of said premises Nos. 35 and 37 Vesey Street, by any like obstruction."

The judgment entirely prevents the defendant from using the bridge or other like obstruction. We find nothing in the evidence which justifies this. We cannot perceive that the bridge is in any material degree a greater obstruction than skids would be if similarly used. The judgment should be so modified as to read as follows: "It is ordered and adjudged that the defendant, his agents, servants, and employees, refrain from unnecessarily or unreasonably obstructing the southerly sidewalk of Vesey Street, in front of the premises Nos. 35 and 37 Vesey Street, by any plank-way or bridge, or other like obstruction elevated above the sidewalk, and reaching from said premises, or from the stoop in front of the same, to the roadway of said Vesey Street, or from unnecessarily or unreasonably hindering or preventing the plaintiffs, or their employees, servants, and customers, from having the convenient use of and passage along the sidewalk of said Vesey Street,

in front of said premises Nos. 35 and 37 Vesey Street, by any like obstruction; and it is further adjudged that the plaintiffs recover of the defendant \$164.20 costs of this action"; and as so modified, it should be affirmed, without costs to either party in this court.

It is difficult to frame the judgment, by the use of general language, so as to protect and secure the rights of the parties. But the rules we have laid down in this opinion will probably be found sufficient as a guide, if it should be necessary to enforce the judgment as modified, and therefrom the meaning and scope of the important words "unnecessarily" and "unreasonably" may with sufficient accuracy be ascertained.

Judgment accordingly.

RIGHT OF PRIVATE PERSON TO OCCUPY OR OBSTRUCT PUBLIC STREETS.—The public have a right to passage over a street, to its utmost extent, unobstructed by any impediments. And any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law: Angell on Highways, 3d ed., sec. 323; Thompson on Highways, 3d ed., sec. 314; Wood on Law of Nuisances, 2d ed., sec. 248; *State v. Mayor etc. of Mobile*, 5 Port. 279; 30 Am. Dec. 564; *State v. Merritt*, 35 Conn. 314; *McCloughry v. Finney*, 37 La. Ann. 27; *People v. Cunningham*, 1 Denio, 524; 43 Am. Dec. 709; *Lavery v. Hannigan*, 52 N. Y. Super. Ct. 463; *Ely v. Campbell*, 59 How. Pr. 333; *Clifford v. Dam*, 81 N. Y. 52. A street includes the sidewalks: *Bonnet v. San Francisco*, 65 Cal. 230; *Ely v. Campbell*, 59 How. Pr. 333; *Clifford v. Dam*, 81 N. Y. 52.

TEMPORARY OBSTRUCTION AND PARTIAL OCCUPATION OF STREETS may, however, be justified on the ground of necessity. The street may be obstructed by placing thereon materials for building or repairing, if it be done in such a way as to occasion the least inconvenience to the public, and the obstruction be not continued for an unreasonable length of time. So, too, a private person carrying on business on a street may occupy a portion of the street for a reasonable length of time for the necessary purpose of receiving and delivering his goods. A street may also be used for the purpose of moving a building from one place to another, provided it be done in a reasonable and judicious manner. Streets may be lawfully used for other purposes than the accommodation of the traveling public, provided such use be not inconsistent with the reasonably free passage of travelers over them. Slight inconveniences and occasional interruptions in the use of a street, which are temporary and reasonable, are not illegal merely because the public may not, for the time being, have the full use of the highway: *Rex v. Jones*, 3 Camp. 231; *Rex v. Cross*, 3 Id. 224; *Rex v. Russell*, 6 East, 430; *Rex v. Carlile*, 6 Car. & P. 636; *Regina v. Belts*, 16 Ad. & E., N. S., 1022; Wood on Law of Nuisances, sec. 256; Thompson on Highways, 3d ed., 314; Wood v. *Mears*, 12 Ind. 515; 74 Am. Dec. 222; *Mathews v. Kelsey*, 58 Me. 56; 4 Am. Rep. 248; *O'Linda v. Lothrop*, 21 Pick. 292; *Gahagan v. Boston & L. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 724; *Judd v. Fargo*, 107 Mass. 264; *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536; *People v. Cunningham*, 1 Denio, 524; 43 Am. Dec. 709; *People v. Horton*, 64 N. Y. 610; *Welsh v. Wilson*, 101 Id. 254; 54 Am. Rep. 698; *Northrop v. Burrows*, 10 Abb. Pr. 365; *State v. Edens*, 86

N. C. 526; *Clark v. Fry*, 8 Ohio St. 358; 72 Am. Dec. 590; *Commonwealth v. Passmore*, 1 Serg. & R. 219; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Mallory v. Griffey*, 85 Id. 275; *Jochem v. Robinson*, 66 Wis. 638; 57 Am. Rep. 298.

In the case of *Rez v. Jones*, 3 Camp. 231, which was an indictment against the defendant, a timber merchant in St. John's Street, London, for the obstruction of a part of the street in the hewing and sawing of logs, the defense was, that he occupied a small timber-yard on the street where the offense charged was committed, and that owing to the narrowness of the street at that place, and the construction of his own premises, he had in several instances necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there, before they could be carried into the yard. His counsel argued that he had a right to do this, because it was necessary to the carrying on of his business, and that it could not occasion any more inconvenience to the public than draymen taking hogsheads of beer from their drays, and letting them down into a cellar. Lord Ellenborough, as is shown by the quotation given from his opinion in the principal case, was not convinced by the argument, and entertained no doubt of the guilt of the defendant. And Ruffin, J., in delivering the opinion of the court in *State v. Edens*, 85 N. C. 526, said: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is of itself a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and as such is not permitted by the law to be done with impunity. But the very object of a highway is that it may be used, and though travel be its primary use, it still may be put to other reasonable uses; and whether a particular use of it, which does not of itself amount to a nuisance, is reasonable or not, is a question of fact to be judged of by the jury according to the circumstances of the case. Unlike the case of a permanent obstruction just referred to, it is not the manner of using the highway which constitutes the nuisance, but the inconvenience to the public which proceeds from it, and unless such inconvenience really be its consequence, there is no offense committed."

NECESSARY OBSTRUCTION OF STREET MUST NOT BE UNREASONABLE, nor unreasonably prolonged in point of time. If a person finds it necessary to obstruct a public street, he must see to it that the inconvenience to the traveling public be as slight as possible, and that it be allowed to continue for a reasonable time only. And a reasonable time is such time as is necessary in the ordinary course of business for its removal. A teamster has no right to keep his team standing in the street in such a manner as to impede travel for an unnecessary length of time. If his wagon breaks down and he is compelled to throw his goods upon the street, he must remove them out of the way in a reasonable time. A tradesman has no right to deposit his goods and wares on the street for the purpose of exposing them for sale. He is bound to carry on his business without producing serious annoyance or inconvenience to others: *Wood on Nuisances*, sec. 257; *Rez v. Jones*, 3 Camp. 230; *Rez v. Russell*, 6 East, 427; *Fritz v. Hobson*, 42 L. T., N. S., 225; *McCloughry v. Finney*, 37 La. Ann. 27; *Turner v. Holtzman*, 54 Md. 148; 39 Am. Rep. 361; *Northrop v. Burrows*, 10 Abb. Pr. 365; *Prime v. Twenty-third St. R. R. Co.*, 1 Abb. N. C. 63; *Dennis v. Sipperly*, 17 Hun, 69; *State v. Edens*, 85 N. C. 522; *Branahan v. Hotel Co.*, 39 Ohio St. 333; 48 Am. Rep. 457; *Bennett v. Lovell*, 12 R. I. 166. In *Turner v. Holtzman*, *supra*, it was held that a stage-coach stopping for an unreasonable length of time on a public highway, in front of and obstructing the entrance to a camp-meeting, was a

nuisance that might be removed by those inconvenienced thereby, or by a deputy sheriff. In *Dennis v. Sipperly*, *supra*, it was decided that a person who builds a cider-mill abutting upon a road, so that his patrons obstruct the way with teams, etc., is liable to an action by those injured thereby. And in *Prime v. Twenty-third St. R. R. Co.*, *supra*, it was held that a street railway company has no right to leave snow which it removes from its tracks heaped up between them and the plaintiff's premises, for a longer time than was reasonably requisite for taking it away.

USE OF STREET FOR DISPLAYING GOODS offered for sale by a tradesman or merchant is not allowable. An individual has no right to appropriate a part of the street to his exclusive use in carrying on his business, even though enough space be left for the passage of the public. Nor has a store-keeper any right to use the sidewalk in front of his store as a sort of an annex to his place of business. If a man's premises are not sufficiently extensive for the transaction of his business without encroaching upon the street or sidewalk, he is bound to seek more spacious quarters elsewhere. The public convenience is paramount to the necessities of private individuals: *Wood on Nuisance*, sec. 257; *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222; *State v. Berdella*, 73 Ind. 185; 38 Am. Rep. 117; *Commonwealth v. Ruggles*, 6 Allen, 588; *Hart v. Mayor etc. of Albany*, 9 Wend. 571; 24 Am. Dec. 165; *St. John v. Mayor etc.*, 6 Duer, 315; *Lavery v. Hannigan*, 52 N. Y. Super. Ct. 463; *Commonwealth v. Wentworth*, Bright. N. P. 318; *Commonwealth v. Passmore*, 1 Serg. & R. 217.

PERMANENT STRUCTURES OBSTRUCTING STREETS and interfering with their unimpeded use by the public are nuisances, which may be abated, although there be space left for the passage of the public: *State v. Berdella*, 73 Ind. 185; 38 Am. Rep. 117; *Bybee v. State*, 94 Ind. 443; *Emerson v. Babcock*, 66 Iowa, 257; 55 Am. Rep. 273; *Commonwealth v. Wilkinson*, 16 Pick. 175; 26 Am. Dec. 654; *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123; *Trenor v. Jackson*, 15 Abb. Pr., N. S., 115; 46 How. Pr. 389; *People v. Mayor etc. of New York*, 18 Abb. N. C. 123; *Hume v. Mayor etc. of New York*, 74 N. Y. 264; *Reimer's Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373; *State v. Leaver*, 62 Wis. 387; *Read v. Perrett*, L. R. 1 Ex. D. 349. The following are instances of such structures, held to be nuisances: A barn occupying nearly half the width of a street in a populous village; a show-case in front of a store extending beyond the house line; a bay-window sixteen feet above the sidewalk, and projecting three and a half feet over the sidewalk; a bridge extending across a street from the second story of a building on one side of the street to the second story of another building on the opposite side of the street; a hay-scales in the street in front of the owner's premises; a fruit-stand encroaching upon the sidewalk; a show-board extending eleven and a half inches over the sidewalk in front of a shop; a wooden awning in front of a store extending over the sidewalk. But in *Hawkins v. Sanders*, 45 Mich. 491, it was held that such an awning was not *per se* a nuisance. So, too, in *Osborn v. Union Ferry Co.*, 53 Barb. 629, it was held that a log of wood placed by the defendant in the public street, at the threshold of its gate, was a nuisance.

ONE WHO CUTS DITCH OR MILL-RACE ACROSS HIGHWAY is bound to place a bridge over it and keep the bridge in repair; otherwise he will be liable for maintaining a nuisance: *Venard v. Cross*, 8 Kan. 248; *State v. Raypholtz*, 32 Id. 450; *Dygert v. Schenck*, 23 Wend. 445; 35 Am. Dec. 575; *Burton Township v. Tuttle*, 30 Ohio St. 62; *Village of West Bend v. Mann*, 59 Wis. 69.

TRADESMAN CANNOT SO CONDUCT HIS BUSINESS AS TO COLLECT CROWDS in front of his store, thereby interfering with the public travel: *Rea v. Carlile*, 6 Car. & P. 636; Wood on Nuisances, secs. 264, 265; *Gilbert v. Mickle*, 4 Sand. Ch. 357; *Elias v. Sutherland*, 18 Abb. N. C. 126. But see *Barling v. West*, 29 Wis. 307; nor will a person be permitted to stand on the sidewalk in front of another's house and remain there, using towards him abusive and insulting language: *Adams v. Rivers*, 11 Barb. 390.

PERSON HAS NO RIGHT TO USE HIGHWAY FOR PASTURE-GROUND for cattle or sheep, nor to allow horses to run at large therein: *Baldwin v. Ensign*, 49 Conn. 113; 44 Am. Rep. 205; *Stackpole v. Healy*, 16 Mass. 33; 8 Am. Dec. 121; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Dec. 239.

STREETS MAY NOT BE USED AS PLAY-GROUND: *Stinson v. City of Gardiner*, 42 Me. 248; 66 Am. Dec. 281; *Vosburgh v. Moak*, 1 Cush. 453; 48 Am. Dec. 613.

RAILROAD COMPANY HAS NO RIGHT TO UNNECESSARILY OBSTRUCT STREETS by letting its cars stand across them: *Ranch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747; *Murray v. South Carolina R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219; nor to use the street for storing and switching its cars, to the special injury of an abutting owner, although the fee of the street is in the city: *Mahady v. Bushwick*, 91 N. Y. 148; 43 Am. Rep. 661; nor without authority to lay additional tracks in the street: *Pittsburgh etc. R. R. Co. v. Reich*, 101 Ill. 157; *State v. Troy & B. R. R. Co.*, 57 Vt. 144; nor to dig a ditch or excavation in a street so as to cut off an owner's access to his lot from the street: *Brakken v. Minneapolis & St. L. R'y Co.*, 29 Minn. 41; nor to leave hand-cars or other obstructions on the side of the highway: *Vars v. Grand Trunk R'y Co.*, 23 U. C. C. P. 143; *Brownell v. Troy & B. R. R. Co.*, 55 Vt. 218; nor to use a part of the street as a freight yard: *Gahagan v. Boston & L. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 724; nor to permanently appropriate any portion of a public highway by obstructions which materially interfere with public travel: *Little Miami R. R. Co. v. Commissioners of Green Co.*, 31 Ohio St. 338.

TREES STANDING IN HIGHWAY do not constitute a nuisance, unless they make an obstruction to travel: *Bills v. Belknap*, 36 Iowa, 583; *Patterson v. Vail*, 43 Id. 142; *Everett v. City of Council Bluffs*, 46 Id. 66. The owner of land through which a public road passes, who gives his consent to the cutting down of a tree standing thereon within a few feet of the traveled track, is guilty of obstructing the highway, if the tree falls within the road and is allowed to remain there to the hindrance or inconvenience of travelers. And he is not relieved from liability by making it a condition of such assent that the tree should not be felled into the road: *Nagle v. Brown*, 37 Ohio St. 7.

OWNER OF LAND THROUGH WHICH ROAD PASSES HAS NO RIGHT TO OBSTRUCT IT because he has not been paid for the land taken therefor: *Draper v. Mackey*, 35 Ark. 497; nor because he has opened a new road equally as convenient for the public as the old one: *State v. Harden*, 11 S. C. 360.

PERSON OCCUPYING STREET FOR FUNERAL has the right to determine the order in which the carriages shall form in the procession: *Goodwin v. Avery*, 26 Conn. 585; 68 Am. Dec. 410.

OBSTRUCTION OF STREET INCAPABLE OF BEING USED for public travel in consequence of natural obstacles is not a punishable offense: *State v. Shinkle*, 40 Iowa, 131.

TRAVELER MUST NOT STUBBORNLY REMAIN ON RIGHT SIDE of the traveled part of a highway, and wantonly cause a collision, when a slight change

of position would have avoided it: *O'Malley v. Dorn*, 7 Wis. 236; 73 Am. Dec. 403.

EXCAVATIONS PROPERLY AND SAFELY MADE UNDER STREET, for the convenience of adjoining owners, are not unlawful, if they are properly guarded and kept in repair: *Fisher v. Thirkell*, 21 Mich. 1. But if not properly guarded, they constitute a nuisance: *Temperance Hall Association v. Giles*, 33 N. J. L. 260.

NO LENGTH OF ADVERSE OCCUPATION OF STREET dedicated to the public use can give a right to continue an encroachment thereon, so as to prevent its use by the public as a highway: *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 5 Id. 437; *City of Visalia v. Jacob*, 65 Id. 434; *City of Philadelphia's Appeal*, 78 Pa. St. 33.

LIABILITY OF CITIES AND TOWNS FOR INJURIES CAUSED BY HORSES BECOMING FRIGHTENED AT OBJECTS IN STREETS. — This subject is discussed at length in the note to *Morse v. Town of Richmond*, 98 Am. Dec. 603-612.

BUSHBY v. NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY.

[107 NEW YORK, 374.]

MASTER CANNOT EVADE DUTY TO HIS SERVANT BY DELEGATING ITS PERFORMANCE to another. Whoever does the act by the appointment or permission of the master represents, and as to that act is, the master.

EMPLOYEE OF RAILROAD MAY ASSUME THAT CAR DELIVERED TO HIM for use is safe, and that the needed requirements for the reception of a load placed upon it are fit for the purpose.

RAILROAD COMPANY MUST PREPARE ITS CARS, whether freight or passenger, for the use to which they are consigned.

FOR DEFECTIVE STAKES AT SIDE OF PLATFORM FREIGHT-CAR, RAILROAD COMPANY is answerable to an employee injured thereby, though the use of such defective stakes may be attributed to the negligence of another employee or of a shipper.

RAILROAD COMPANY DELEGATING TO SHIPPERS DUTY OF SEEING that freight-cars are in good condition and safely loaded is answerable for their negligence to one of its employees injured thereby.

RAILROAD COMPANY'S DUTY TO ITS EMPLOYEES requires it to use diligence and care, not only in furnishing proper and reasonably safe appliances and machinery, and skillful co-employees, but also in making and promulgating rules, which, if faithfully observed, will give reasonable protection to employees.

ACTION by plaintiff to recover damages for injuries received while acting as a brakeman in the employ of defendant. At the trial plaintiff was nonsuited. He moved for a new trial, which was granted by the general term of the supreme court. From the order granting a new trial the defendant appealed.

E. C. Sprague, for the appellant.

A. Hadden, for the respondent.

By Court, DANFORTH, J. The defendant, with knowledge that it was to be used for the carriage of lumber over its tracks and by its servants, delivered at its station in Webster, to one Lewis, a platform car. To the sills of this car on each side, six permanent loops or iron pockets were securely bolted. These were purposed and intended for the reception of stakes or standards, in order that so equipped the car would be adapted for carrying a loose load such as lumber or the like. The stakes were not furnished with the car. Lewis had never before loaded a car. On this occasion he put a stake in each of four pockets on either side of the car and piled on and arranged the lumber under the direction of the defendant's station-agent, who regulated the length of the stakes. The car was then added to a freight train on which the plaintiff was employed as brakeman, and in the performance of his duty he was necessarily upon the car while the train was going around a curve at a high rate of speed. At that moment one of the stakes broke, and by reason thereof, he, without fault on his part, was thrown with the lumber upon the track, and by the fall severely injured. Upon examination it was found that the stake in question was made "of very poor white wood, —brash, brittle wood,—and partially decayed." "The outside was spongy like a cork where it had been shaved off with an ax." "It was a dead stick and had lost its strength, and was punky." "It had broken off almost even with the top of the stake-hole." It did not appear that the defendant had made any rules or directions as to the inspection of such cars, or that any agent of the company except as above mentioned superintended the putting in of the stakes. The station-master testified that he had "no printed instructions in regard to loading the cars, or anything on that subject," or in regard to seeing how the stakes were, but only generally, that he wanted to see that everything was in order; he had no special instructions. The defendant, however, relies upon its "system." That was to let the shipper load and stake, and as to inspection, the evidence relied upon in its behalf only tends to show that if, in the general performance of the duties of their employment, the station-agent found anything out of the way he should correct it, or if the conductor or brakeman saw a defect he should report it to the station-master. No special duty was imposed on either in regard to inspection, nor direction given as to its manner. Care in all matters was enjoined

upon them as a part of a servant's duty to his employer,—nothing more.

The defendant moved for a nonsuit, upon the grounds that "no cause of action has been established by the evidence." "That no negligence on the part of the defendant has been established by the evidence such as would sustain the action." "That whatever negligence may have been shown, if any, in this case, is the negligence of co-employees of the defendant for which the defendant is not responsible." "That the plaintiff's own negligence contributed to his injury in such a way as to defeat his right of action." The plaintiff asked to go to the jury upon the questions,—1. Whether the company should not have made and promulgated rules in respect to the inspection of the cars that were to transport the lumber in regard to the stakes; 2. Whether the company exercised due care in furnishing safe and suitable machinery, means, and appliances for the running of this car; 3. Whether the defendant was guilty of any negligence which contributed to the injury sustained by the plaintiff; 4. Whether the plaintiff himself was guilty of any fault or negligence on his part which contributed to the injury. The court expressed the opinion that, whether the plaintiff was guilty of any negligence which contributed to the injury would be a question for the jury if the case were submitted to them, but refused to submit any question to the jury, and granted the motion for a nonsuit, and the plaintiff's counsel excepted. The exceptions were ordered to be heard at the general term in the first instance. That court was of opinion that the case was one for a jury, and directed a new trial. Against that decision the defendant appeals and makes the following points:—

1. That "the stakes were not appliances or machinery within the rule which requires a master to furnish with reasonable care proper and adequate machinery or other appliances for the proposed work"; but on the contrary, the defendant says they "were appliances furnished and employed by the shipper in loading the car with lumber to be transported by the defendant."

Personal negligence is the gist of the action, and the duties referred to in the rule cited are those of the master, and he cannot evade the responsibilities incident thereto by delegation of them to another. Whoever does the act by his appointment or permission represents, and as to that act is, the master. To hold otherwise would exempt a corporation

from all liability, and we must at the outset determine to which of the acts the one complained of belongs. Did the stakes form a part of the car, or were they an incident to the load? It was proven that the transportation of lumber was a considerable part of defendant's business. We may take notice of the fact that such freight is common to all railways. It is in evidence, also, that the stakes were necessary and usual in preparing for such a load. The car actually furnished indicated by the iron sockets where such stakes should be placed, and were arranged and prepared for them. Had the car when sent to the shipper been equipped with stakes, and so ready for use, I suppose no one would doubt that for any accident arising from the unfit material of which they were made, or from imperfect construction, the owner would be liable. If the iron socket had broken from a known defect in the iron, or from a known imperfect connection with the car, and the plaintiff from that cause received the injury from which he now suffers, or if the sill of the car to which the socket was fastened had given way by reason of inherent weakness, the result would be the same. This consequence follows because experience has shown that owing to the rapid speed at which the train travels, and the violent shocks to which a car is sometimes exposed, every part of it must be made of great strength. This rule should apply to any appliance which is made part of the structure, and it can make no difference that it may be for an occasion rather than constant use. The question relates to the condition of the car when placed in the hands of the servant, and its delivery to him raises for his benefit the implication that the employer has used suitable care and foresight in adopting it as an instrument or means to carry on its business. Upon this he might rely as an assurance, not only that the body of the car and its running gear were safe, but that the needed requirement for the reception of the load placed upon it was also fit for the purpose. The platform and the stakes constituted the bottom and the sides of the car, and one was as much a part of it as the other.

Moreover, it was the duty of the defendant, by virtue of the statute which created it and made it in many ways as the price of its existence a public servant, not only to "take" the freight offered, and regulate "the time and manner" in which it should be transported, but also furnish sufficient accommodation for its transportation as well as for the transportation of passengers, and anticipating the variety of cars

which that duty would require, the statute names not only passenger-cars, baggage-cars, freight-cars, and merchandise-cars, but also "lumber-cars," *eo nomine* (Act of 1850, c. 140, sec. 38), and even points out the place they shall occupy in the making up of certain trains. This provision is also incorporated into the Penal Code, section 422. The stakes pertained to the "manner," and were part of the accommodations furnished for transportation of the lumber,—they were not part of the load, nor appurtenant thereto. They belonged to the car as a "lumber-car." With stakes the car in question was fitted to carry lumber, and was a lumber-car; without stakes it was not. Of course the stakes served to secure or keep the load upon the car, but that would be through the construction of the car, and not through any application of the stakes to the load. The platform of the car prevented the lumber from falling through; the stakes of the car were designed to prevent it from falling off. The stakes were not a temporary expedient, as a rope binding the load or a block at the wheels of a carriage. To remove a load so bound, the rope must be taken away, and if another load is put on it, it must be rebound, and so with the block. But the stakes, like the bottom or platform of the car, remain after the load is removed, and the car, without alteration, remains ready to receive another load. The duty, therefore, was upon the master to fit or prepare the car for the use to which it was consigned, and no encouragement should be given to an omission to perform that duty, or to negligence or failure in any degree in respect to it. On the contrary, a just public policy, as well as that of the statute, requires a court to hold a railroad company to a strict observance of its obligation.

2. The next proposition of the defendant is, that "it is not necessary in this case to decide whether the stakes in question were or were not appliances or machinery within the meaning of the rule invoked by the supreme court at general term" (and to which I have above referred), "for the reason that the system under which they were furnished, inspected, and employed was perfectly well known to the plaintiff, and he took the risks of the consequences of that system."

There was no system as to this matter. If the evidence shows that such practices had obtained before, it merely shows that the defendant chose to delegate a duty to the shipper which the corporation should have performed. It is equally responsible for his negligence; his negligence is its negligence: *Durkin v. Sharp*, 88 N. Y. 225.

3. But the defendant says: "Assuming that the stake in question was a machine or apparatus, within the meaning of the said rule, if there was any negligence in respect thereto, it was the negligence either of the shipper of the lumber or on the part of the co-employees of the plaintiff, and this action cannot be maintained for such negligence."

If I am right in the views already expressed, the negligence was corporate negligence, in the performance of a duty which it could delegate only at its own peril.

The points of the appellant state that by the system employed, the loading was to be done by the shipper. It is unnecessary to say what the defendant's case would be if the defect complained of had been in that act. It was not. It was in preparing the car to receive and hold the load. The load might have been removed altogether without remedying the defect, or mathematically adjusted in its bearings without preventing the consequences for which compensation is now asked. The defect was in the car as a "lumber-car."

4. So far as the remaining point made against the judgment denies negligence in respect to the quality of the stakes, it is sufficient to refer to the evidence above recited, and to which there was no answer or contradiction, to show that wood was used in their formation, which in its best condition was soft and feeble, and which, in fact, was unsound and decayed, and this was obvious to any one upon inspection. But it is also said that, "under the system adopted, the only possible negligence for which the defendant could be responsible was in the inspection; and it is submitted that the jury should not have been permitted to find negligence in inspection as an affirmative fact upon the uncorroborated statement of the witness Eygabroat."

This witness was an employee of the defendant, and on its train. He saw the accident,—the timber falling from the train, and the plaintiff falling with it. The train was stopped, the plaintiff picked up, and the stake examined. He says: "I observed that one of the stakes was broken. It was of very poor white wood,—brash, brittle wood,—and partially decayed. It was broken off about even with the top of the stake hole. . . . The end that was broken off looked to me like a stake that had been cut out of a dead tree, and it looked as if it was dozy and partially decayed. The outside of it was spongy and like a cork, where it had been shaved off with an ax." There is other evidence to the same effect coming from

the defendant's employees, called by the plaintiff, as well as other persons, and no witness called by the defendant, nor contradiction of plaintiff's witnesses at any point. There was a large amount of testimony for the jury. There were no rules of the company requiring inspection, nor was there any but casual inspection given by the station-agent, according to his custom, of the stakes and load, and by others to see if the load was rightly placed.

As to these persons the question would not be whether they believed the stake sound, but whether they were justified in so believing. But the main question was, whether the corporation, by any of its agents, failed to exercise due care to prevent injury to the plaintiff from defects in the car furnished for his use. The rule as to its duty was again formulated in *Abel v. President etc. Delaware and Hudson Canal Company*, 103 N. Y. 581, 57 Am. Rep. 773, where the court said, in substance, that "the law imposes upon a railroad company the duty to its employees of diligence and care not only in furnishing proper and reasonably safe appliances and machinery, and skillful and careful co-employees, but also of making and promulgating rules which, if faithfully observed, will give reasonable protection to the employees."

Under each branch of this rule, then, there was a question for the jury in this case, and the general term committed no error in reversing the decision of the trial judge and granting a new trial. As the appeal of the defendant has prevented that, the order of the general term should be affirmed, and in pursuance of the stipulation which made the appeal possible, the plaintiff must have judgment absolute in his favor.

The order appealed from is therefore affirmed, and judgment absolute ordered for the plaintiff, with costs in all courts.

Ordered affirmed, and judgment accordingly.

DUTIES OF RAILWAY COMPANY TO ITS EMPLOYEES which cannot be evaded by delegating their performance to agents and fellow-servants: See note to *Fisk v. C. P. R. R. Co.*, ante, p. 22.

CARE WHICH RAILWAY COMPANIES MUST EXERCISE to provide tracks, bridges, machinery, and other appliances, to enable their employees to discharge their duties with reasonable safety: *St. Louis, Ft. S., & W. R. R. Co. v. Irwin*, ante, p. 266, and note.

RULES SHOULD BE MADE AND PROMULGATED BY RAILWAY COMPANIES, which, if faithfully observed, will give reasonable protection to their employees: *Abel v. D. & H. Canal Co.*, 57 Am. Rep. 773.

PEOPLE v. SHARP.

[107 NEW YORK, 427.]

PROVISION THAT NO PERSON SHALL BE COMPELLED TO BE WITNESS against himself in a criminal case does not inhibit the enactment of a statute requiring any person offending against the statute concerning bribery to attend and testify as a witness upon any trial, hearing, proceeding, or investigation against any other person so offending, but declaring that "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying"; and further declaring that a person so testifying to the giving of a bribe which has been accepted, "shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such indictment or prosecution."

WITNESS IS NOT PRIVILEGED FROM ANSWERING because his answer would expose him to disgrace and infamy, if the case is so situated that he cannot be exposed to the danger of conviction and punishment, with respect to the matters disclosed by his answer.

STATE SENATE HAS POWER TO INQUIRE INTO ALLEGED ABUSES OF PUBLIC POWER and the corruption of public officers, and to delegate the duty of making such inquiry to one of its committees. Such committee may compel the attendance of witnesses, and on their refusal to answer may commit them for contempt.

WITNESS DOES NOT WAIVE HIS PRIVILEGE, nor become a voluntary witness, by answering criminating questions without objection, or protest, where under the statute he is obliged to answer. He is not required to go through the formality of an objection which, however made, would be useless.

WITNESS TESTIFYING BEFORE COMMITTEE OF LEGISLATURE, with respect to a charge of bribery in which he is implicated, must be regarded as testifying against another person so offending, upon a "trial, hearing, proceeding, or investigation," within the meaning of section 79 of the Penal Code.

EVIDENCE. — An attempt to bribe one person should not be allowed to be proved on a prosecution for bribing another person at a different time.

EVIDENCE OF DISPOSITION TO COMMIT CRIME ought not to be admitted against the defendant in a criminal case.

EVIDENCE OF PRIOR CRIME can have no legitimate place in an investigation as to whether a subsequent crime was committed by the same person.

CONCLUSION OR SUPPOSITION OF WITNESS IS NOT EVIDENCE against another person.

EVIDENCE OF ABSENCE OR FLIGHT OF PERSONS wanted as witnesses against a person being prosecuted for crime is not admissible on behalf of the prosecution, where the evidence already received tended to show that such absent persons were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue, and were seemingly connected with the defendant in the act charged.

EVIDENCE OF COMMISSION OF CRIME OTHER THAN ONE CHARGED. — The cases on this subject stated and analyzed by Peckham, J.

PROSECUTION against Jacob Sharp for the bribery of a member of the common council of the city of New York. The

defendant was convicted in the court of oyer and terminer for that city; and the judgment of conviction was affirmed on appeal to the general term.

W. Bourke Cockran, Albert Stickney, and E. W. Paige, for the appellant.

McKenzie Semple, De Lancey Nicoll, and George F. Comstock, for the respondent.

By Court, DANFORTH, J. The indictment was found October 19, 1886. In substance, it accuses Jacob Sharp and six other persons of giving and offering, and causing to be given and offered, to one Fullgraff, a member of the common council of the city of New York, twenty thousand dollars, with intent to influence him in respect to the exercise of his powers and functions as such member of the common council, upon the application of the Broadway Surface Railway Company for the consent of the common council to the construction of a street railway. Sharp was tried separately. Direct evidence was given from which a jury might find that Fullgraff had in fact been bribed, and other evidence altogether of a circumstantial character and by no means conclusive, but sufficient, as the jury have said by their verdict, to warrant a finding that Sharp was concerned in the commission of the crime, and therefore guilty of the offense charged. Exceptions were taken in behalf of the defendant to several decisions of the trial court in admitting against his objection certain items of testimony, which it is conceded were material, and without which it is claimed by the appellant a conviction could not or might not have been obtained. First: among others the counsel for the prosecution proved that the defendant was examined as a witness before a committee of the senate of this state, appointed to investigate, among other things, the methods of the Broadway Railway Company in obtaining such consent, and also the action in respect thereto of the board of aldermen of said city, which granted, or of any member thereof who voted for, the same, and that he upon that occasion gave testimony which the learned counsel for the prosecution claimed to be "irrefutable evidence of his participation and complicity in the commission of the crime." This testimony the prosecutor offered in evidence. It was conceded by the prosecution that at the time he testified the defendant was before that committee under the operation and compulsion of a subpoena duly

issued by committee, and that the testimony he gave was in response to questions propounded in their behalf. Its admission on the trial was objected to on the ground that it was given under privileged circumstances; that the defendant was compelled to attend and testify, and that evidence thus elicited was not competent "upon the trial of a person where the subject under inquiry is that about which he was then interrogated."

The question before the jury was, whether the defendant had committed the crime of bribery, as alleged in the indictment, and as that offense is declared by section 78 of the Penal Code under which the indictment was found. This section forms part of title 8, which relates to crimes against public justice, and of chapter 1 of that title, concerning bribery and corruption. It is preceded by other provisions concerning bribery; as, (section 44) of an executive officer, (section 66) of members of the legislature, (section 71) of a judicial officer, (section 72) of such an officer accepting a bribe, (section 74) of a juror, and embracing all these as well as the provisions of section 78, section 79 declares that, — 1. A person offending against any provision of any foregoing section of this code, relating to bribery, is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation in the same manner as any other person; 2. "But," it declares, "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying"; 3. A person so testifying to the giving of a bribe which has been accepted "shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution." By a subsequent section (section 712 of the Penal Code), these provisions are so modified as not to permit such evidence being proved against the witness upon any charge of perjury committed on such examination.

The first question upon this appeal is as to the meaning and spirit of the statute contained in this section (section 79). The appellant contends that by it the disclosures made by him before the senate committee were privileged, and could not be used against him on the trial now under review; and one of the learned counsel for the people concedes that this force might be attributed to the statute if it were wholly a

valid enactment (as he contends it was not), and if the evidence given before the committee had not been entirely free and voluntarily (as he contends it was). These propositions lie at the bottom of the controversy.

1. Is the enactment valid? The learned counsel for the people contrast the constitutional provision, "that no person shall be compelled in any criminal case to be a witness against himself" (article 1, section 6), with the compulsory words of section 79, already quoted, and pronounce one to be "the direct opposite of the other," and, as we understand the argument, it is that the constitutional exemption is absolute and complete, permitting the witness to lock up the secret in his own heart, and does not permit the evidence to be taken from him at all; that this right is infringed by the provisions of section 79, and that it is therefore invalid. It is, I think, an answer to this proposition that the same section declares, not only that the testimony given by the witness shall not be used in any prosecution or proceeding, criminal or civil, against him, but that the very fact of so testifying may be pleaded in bar of an indictment or prosecution for the giving of a bribe which has been accepted. It should be borne in mind that the sole object of the introduction of the defendant's testimony was to prove from it that he was guilty of giving the bribe, which, as the evidence tended to show, Fullgraff accepted, and the giving of which was the sole accusation against the defendant.

If, then, the case is within the terms of the section, as upon this point it is assumed to be, the immunity offered by it distinguishes the statutory provision from the constitutional inhibition, inasmuch as it indemnifies or protects the witness against the consequences of his testimony. To that effect is the decision of the court of appeals in the case of *People ex rel. Hackley v. Kelly*, 24 N. Y. 74. The court there had under review an order adjudging the relator Hackley guilty of contempt in refusing to answer before the grand jury questions quite similar in substance to those propounded to Sharp by the senate committee. The complaint under examination was against certain aldermen and members of the common council of the city of New York, for receiving a gift of money under the agreement that their votes should be influenced thereby in a matter pending before them in their official capacity, and Hackley as a witness was asked as to the disposition made by him of a certain pile of bills received from one H., and said to amount to fifty thousand dollars. Hackley

asserted his privilege at common law and under the constitution, and demurred to the question. The court of sessions adjudged him guilty of contempt for refusing to answer, and ordered him to be imprisoned. The supreme court affirmed the order, and the court of appeals affirmed the decision. The principal question discussed by this court was, whether the relator could lawfully refuse to answer the interrogatory, and in reaching its conclusion the court examined the provisions of chapter 539 of the laws of 1853, entitled "An act to amend the existing law relating to bribery," and also chapter 446 of the laws of 1857, amending the charter of the city of New York. Both acts relate to bribery. We shall again refer to them, and it is sufficient in this connection to say that each act contains provisions compelling the attendance and testimony of witnesses, but provides full protection against the use of their testimony in any proceeding, civil or criminal, against the person so testifying. The object of these provisions was said to be to enable the public to avail itself of the testimony of a participator in the offense, and to enable either party concerned in its commission to be examined as a witness by the grand jury or public officer intrusted with the prosecution, and the court held that the relator was not privileged by the constitution, inasmuch as he was protected by the statute against the use of such testimony on his own trial.

The learned counsel for the people also argues that the statutory protection afforded by section 79 does not go far enough; that the indemnity it offers to the accused witness is partial, and not complete; that while it may save him from the penitentiary by excluding his evidence, it does not prevent the infamy and disgrace of its exposure. This argument is also met by the opinion in the Hackley case, *supra*. It was there argued for the relator that he was not wholly protected; that his testimony might disclose facts and circumstances which, being thus ascertained, might be proved against him by other testimony than his sworn evidence. But the answer of the court covered, not only that supposed case, but the objection that the disgrace of exposure would still remain, although the evidence was not used. "That," said the court, "is the misfortune of his condition, and not any want of humanity in the law." "If a witness," said Judge Denio, 24 N. Y. 83, "object to a question on the ground that an answer would criminate himself, he must allege in substance that his

answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense"; adding, "If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged." The conclusion of the court was, that the relator was not exempt from testifying, and it follows from the decision then rendered that the provision of the code, which embodies the same conditions as those then under consideration, is in no sense repugnant to the constitution.

2. Was the testimony of Sharp given of his own will, or by compulsion? He would, as the prosecution concedes, have testified against himself, if, as a witness on his trial, he had sworn as he did before the committee; but he was not sworn upon his trial, and this fact, they say, left him to the operation of the common-law rule, when his admissions made elsewhere and in another place were sought to be proved by other witnesses. To reach this conclusion, it is argued with great earnestness by one of the learned counsel for the people, "that the resolution of the senate and the inquisition of the committee were illegal and void proceedings, having no significance or force in the judgment of the law." "To say," continues the counsel, "that Mr. Sharp was a witness implies a court or magistrate authorized to administer the oath and take the evidence"; and his claim is, that Sharp was "under no compulsion of law to be present at this inquisition, to take an oath, or to testify." In the view of the learned counsel for the prosecution, and as characterized by him, "the sittings of the committee were merely meetings of private persons, among whom was Mr. Sharp." "There were," he says, "conversational questions and answers in which he, Sharp, took a part by answering interrogations addressed to him"; and the contention of the learned counsel follows, "that Sharp's statements on that occasion may be used in any proceeding to which he is a party." If the premises were true, this construction might in ordinary cases follow. But if they are correct, the courts below seem to have misconceived the situation in which Sharp was placed, for we cannot find in the voluminous record before us any suggestion that the senate had not full power to take cognizance of, and to inquire through its committee into, the alleged abuses of public power and the corruption of public officers, nor that such proceed-

ings in the present case, having in view the possible necessity of an alteration in the existing law, were not in every respect valid and legal. Nor are we left to this negative evidence that such question was not raised upon the trial. It appears by the concession there made and already quoted, that upon objection being made to the introduction of Sharp's testimony, on the ground that his statements before the committee were privileged, made under compulsion of a subpoena and the constraint of an oath duly administered by the committee, who confined his evidence to such questions as the committee chose to ask, the prosecution not only made the admission already set out, but also required the resolution under which the committee assumed to act to be put in evidence, and so connected with the admission. That being done, the prosecution went into evidence of the acts of Sharp, to show that he waived his privilege before the committee by not asserting it; in no manner questioning the due appointment of the committee nor its powers. In view of these facts, it is too late to raise the question here. Moreover, the decision in the case of *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49, establishes, so far as this court is concerned, that the senate had constitutional power to pass the resolution, and that its committee was authorized to carry it into effect. In that case it appeared that charges of fraud and irregularity had been made by the public press and otherwise against the commissioners of public works in the city of New York, and the senate, by resolution, directed its committee "to investigate" that department, with power to send for persons and papers, and report the result of its investigation and its recommendations concerning the same to the senate. The relator was summoned and appeared and testified, but refusing to answer certain questions, was, on the report of the committee, committed by the senate for contempt. Upon *habeas corpus*, questions as to the constitutional power of the senate to order the investigation and legality of its proceedings were distinctly presented and affirmed.

The case on which the learned counsel for the people now places his argument, *Kilbourn v. Thompson*, 103 U. S. 176, was cited in favor of the prisoner, fully commented upon by the court, and shown to have no application. The action of Congress reviewed in that case was in substance a creditor's bill, or effort to impeach a transaction already closed between the United States and one of its debtors. The supreme court

of the United States held that as to it Congress had no judicial power, and exceeded its authority in the attempted investigation. The McDonald case, on the contrary, reviewed a proceeding which was necessary or appropriate to enable the legislature to perform its functions, and it was held to be no objection that it partook in some degree of a judicial character. That case brought up proceedings on all substantial points, like the resolutions which were at the bottom of the inquiry before the senate committee in this case, and its decision makes any further discussion of their validity quite unnecessary. It follows that the investigation before the committee was not beyond its powers, nor were the resolutions under which they acted void, or without legal significance or force. As, therefore, it cannot be said that the committee was without power to compel the witness and require his testimony, the respondent must find elsewhere reasons, if there are any, in support of the proposition that the evidence was by a willing witness. To that end it is further said in behalf of the people that Sharp, by not asserting his privilege before the committee, waived it. But if the case comes within the purview of section 79, *supra*, of that act, the senate subpoena and the resolution of the senate were compulsory, and it was not necessary for the protection of the witness that he should either by deed or word set either at defiance, or refuse to obey the summons, or refuse to answer the questions of the committee. It is enough if he was obliged by law to answer the inquiry, and he could not be required, in order to gain the indemnity which the same law afforded, to go through the formality of an objection or protest which, however made, would be useless. In the Hackley case, *supra*, the witness did plead his privilege, but it was of no avail, because he was obliged by law to answer the inquiries, and the law was held imperative and sufficient, although the case was one within the very terms of the constitution, because by the same law he was protected against the consequences of his admissions. Whether he asserted his privilege, or whether he was silent and submissive to the laws, could make no difference. The legislature, for reasons of public interest, required a discovery of the whole truth as to matters involved in their inquiry. And one answering in compliance with their command cannot be deemed a willing or consenting person within the meaning of the maxim, *Volenti non fit injuria*, on which respondent relies. A person who yields from the

necessity of obedience cannot be said to have the power of acting by his own choice. And where the law says he shall be compelled to attend, and shall be compelled to testify, acquiescence is not election, and he is not one of whom it can be said he receives no injury from that to which he willingly and knowingly agrees and consents. There can be no volition where there is neither power to refuse nor opportunity to elect. Under such circumstances, the witness must be deemed to speak for the safety of his person, and in view of the indemnity which the law promises. A man is none the less robbed because, yielding to irresistible power, he makes no resistance; and a witness who gives up his secret at the command of the law is as much under compulsion as if he ventured on the punishment that would follow on his refusing to disclose it. In the Hackley case there was the plea of privilege, but it availed nothing because the law required an answer. The position of the witness was in no respect changed by the plea. In the Keeler case, *supra*, there was refusal to answer under the advice of counsel, but it availed nothing. To refuse to attend the committee or testify would, moreover, have rendered the witness guilty of a misdemeanor: Penal Code, secs. 68, 69. It seems to us that the evidence of Sharp before the committee was given under the penalty of commitment and imprisonment for contempt, and consequently that it was obtained from him by compulsion.

So far, we have assumed the case to be within the provisions of section 79 of the Penal Code, *supra*, and we come now to the contention on the part of the people that the section (79) does not embrace such investigation, but, on the contrary, is to be limited to such testimony only as might be given upon "trial, hearing, proceeding, or investigation, in the course of a criminal prosecution, and that it has no application to such testimony as might be given in the course of legislative proceedings or investigations." It was held in *People v. Keeler*, *supra*, that the senate might proceed in its own way in the collection of such information as might seem important in the proper discharge of its functions; and whenever it was deemed necessary to examine witnesses, that the power and authority to do so might properly be referred to a committee with such powers as should appear to be necessary or expedient in the case; and that, notwithstanding the vesting of judicial power in the courts, certain powers, in their nature judicial, belong

to the legislature, and might be delegated to a committee authorized to take testimony and summon witnesses, and that a refusal to appear and testify before such committee, or to produce books or papers, would be a contempt of the house. It was also held that when institutions or public officers were ordered to be investigated, it is to be presumed that such an investigation was with a view to some legislative action in regard to them; and moreover, that the terms of the resolution directing it may be looked at to ascertain the legislative intent. The resolutions which led to the examination of Sharp were passed January 26, 1886. They were preceded by a reference to the provisions of the constitution and statutes relating to street railroads, and the prohibition against such road without "the consent thereto of the local authorities having control of the street upon which it was proposed to construct the road," and a reference to the charges that consent to the railroad upon Broadway "was obtained through fraud, and by and through corrupt influence and bribery of such authorities," viz., the aldermen of the city of New York, and a recital that a strong and reputable sentiment in that city demands at the hands of the senate "an investigation of the methods in obtaining such consent." It was for these reasons resolved by the senate that its railroad committee be authorized "to investigate fully all matters relating to the methods of the Broadway Surface Railroad Company, or of any other person or corporation relating to or in obtaining such consent, and also to investigate fully the action of the board of aldermen of said city, which granted or gave the same in respect thereto, or of any member thereof who voted for the same in respect thereto."

The committee were given full power to prosecute such investigation in such directions as it thought necessary as to all matters relating to the granting of said consent, and the inducements which led thereto, with full power to send for persons and papers, and to employ counsel and other assistants in the work before them, and the sergeant-at-arms was directed to attend the sittings of the committee, serve subpoenas, and do such other things as it directed. A report was required, with recommendations, and particularly as to the policy of an amendment to the constitution, vesting the power to grant such consent in some other authority than as at present provided." It is apparent from their terms that the resolution which permitted the examination of Sharp involved an inquiry which the legislature had a right to make, and which, in view

of the recitals in the resolution, it was its duty to make, in order that the abuses which were disclosed might be cured by further action by the legislature or by the people. The inquiry was judicial in its nature, was to be pursued for a lawful end, and by means as comprehensive and sufficient as could be provided. The occasion and the action of the legislature meet every suggestion of the court in the case last cited as to the expression of legislative intent, and the imposition of the duty of obedience upon all persons who should be summoned to make, by their testimony, the investigation serve the ends of public justice.

We have seen that there is no conflict between the will of the legislature, as expressed in section 79, and the constitution, and we are now to construe that section in accordance with the legislative intent. In its exposition full effect is to be given to that intention, and if possible, full force and validity to every word, so that no part be annulled or rendered nugatory. It cannot be doubted that the case is brought literally within the language of the section (section 79, *supra*). Sharp was a person offending against one of the specific provisions of the code in relation to bribery. He was accused and has been convicted of giving a bribe. He was, therefore, qualified under that section (79) as a "competent witness." Against whom? Why, against another person "so offending," that is, another person offending against any of those provisions of the code "relating to bribery." He was, in fact, a witness before the committee in relation to bribery. Was he a witness against another person? The resolution recites, as the immediate cause of the action of the senate, the alleged bribery of certain "local authorities consenting to the railway," and then to make the accusation specific as to the person, says "the local authority" referred to as the authority which consented "was the aldermen of said city." There was, then, another person offending.

Sharp was, by the statute, made competent as a witness as to the subject-matter against him. The legislature may be presumed to know that such a person, although made by law competent as a witness against that other person, would even then testify, if at all, voluntarily, and to his own crime, and therefore would not be likely to testify at all; and so they not only make him a competent witness, but add, "and [he] may be compelled to attend and testify," meaning, of course, to give evidence against that other person, including, at any rate, the other party to the transaction. If, as in the case

before us, the "person offending" is the giver of the bribe, then he might be compelled to testify against the receiver of the bribe. Where? Why, upon any trial, upon any hearing, upon any proceeding, or "upon any investigation." It follows that if we adhere to the ordinary and natural meaning of these words, and apply them to the case in hand, we shall find neither inconsistency nor incongruity, but complete adaptation. The senate was dealing with the charge made against the aldermen of the city, that their consent was obtained by and through certain methods, and among others, bribery; it admitted that an investigation of those methods was demanded; therefore the senate authorized its committee "to fully investigate" all matters relating to these methods, and also to investigate fully, not only the action of the board of aldermen which granted or gave such consent, but also that of any member of the board, with full power and authority "to prosecute its investigations in any and all directions in its judgment necessary to a full and complete report to the senate as to all matters relating to the granting of such consent, and the influences and inducements which led thereto," and gave to the committee full power and authority to send for persons and papers, to hold its sessions in New York, and conduct its "investigations" there. Clearly there is to be an investigation, in the language of section 79, of a charge of bribery of a public officer, with an intent to influence him in the exercise of his powers. The committee were to ascertain, through testifying persons and papers, whether the charge was well or ill founded. Whoever gave evidence before them attended upon an "investigation" and testified; and unless we greatly confine and limit the meaning which the words used by the legislature usually express, it is impossible to say that the case is not within the statute. It is claimed, however, by the learned counsel for the people, that the "investigation, in the mind of the legislature, did not include an investigation directed by itself and conducted through its committee, but only an 'investigation' in the course of a criminal prosecution," and upon that construction the judgment of the court below was put. It is no doubt the duty of the court to restrain the operation of a statute within narrower limits than its words import, if it is satisfied that, giving to them their literal meaning, the statute would be extended to cases which the legislature never intended to include. But this can only be done where a reason for some limitation is found, either in the occasion for

which they are used, or in the context. That is not the case here. In the first place, the construction contended for in behalf of the people is contrary to the plain and ordinary meaning of the words used. "Any investigation" would include all investigations in the conduct of which persons may be called by authority as witnesses to testify under oath concerning any matter. Therefore it must include, if taken literally, the action of a legislative committee according to the direction given it, and acting with authority to subpoena witnesses, and enforce their attendance, and examine them upon oath. Nor is it any answer to this conclusion to say that only a judicial investigation was intended. If we are right in the views above expressed, the legislature possessed, and might delegate to its committee, any power short of final judicial action which they thought necessary in any particular case; and although the investigation was only for the collection of information required for the proper performance by the legislature of its own functions, it might, nevertheless, be a proceeding requiring witnesses, and power to compel their attendance. It is, moreover, assumed and claimed by the prosecution that the privilege of a witness to be exempt from a compulsory disclosure of his own criminal conduct is the same in such an examination as when sworn in court. If that be so, it affords a sufficient reason for including a legislative investigation among the proceedings in which persons otherwise privileged should be compelled to testify. Public policy would often require the fullest disclosure; and the very case before the legislature was an instance in which that policy might be defeated, if the utmost latitude was not permitted, and the greatest freedom of examination, to ascertain the truth of the public charge that a great and valuable franchise had been obtained through corruption and bribery of public officials.

In *In re Falvey*, 7 Wis. 630, it appeared that, in pursuance of a resolution of the legislature of Wisconsin, not unlike that before us, having for its object the investigation of frauds, bribery, and corrupt acts, charged to have been perpetrated by inducing the legislature to grant certain lands, and the investigation of cases of alleged bribery on the part of certain railroad officials and others in procuring the grant, a committee was appointed with powers similar to those conferred by the resolution before us. One Falvey was subpoenaed before the committee, but refused to answer, and on *habeas corpus* it was

adjudged that he could claim no privilege, and his refusal to answer was a contempt, because the law of that state provided that no person so examined and testifying before a committee so appointed should be held to answer in any court of justice, or be subject to any penalty or forfeiture for any fact or act touching which he should be required to testify. It was held that this language furnished a full protection. No such provision relating to the offense of bribery is found in any statute of this state prior to 1869 (Laws 1869, c. 742), but the legislation on the subject extended from time to time until consolidated and enlarged in the Penal Code. The provisions of the Revised Laws (vol. 2, p. 191, sec. 3) were made part of the Revised Statutes (R. S., vol. 2, tit. 4, pt. 4, c. 1, art. 2, sec. 9, p. 682), and related to the bribery of certain state officers, judges of any court of record, and judicial officers. Section 10 of the same article related to the acceptance of a bribe by either of these officers; section 11 related to the acceptance of bribes by jurors, arbitrators, and referees, and section 11 to persons who should by gifts corrupt or bribe them. In 1853 (Laws 1853, c. 217, sec. 14), by the act amending the charter of the city of New York, and above cited, a penalty was imposed for bribing any member of the common council or other officers of that corporation, and it was provided that every person offending in that respect should be a competent witness against any other person offending in the same transaction, and might be compelled to appear and give evidence before any grand jury or in any court, in the same manner as other persons, but declared that "the testimony so given should not be used in any prosecution, civil or criminal, against the person so testifying." In the same year (Laws 1853, c. 539), the provisions of the Revised Statutes (*ante*) were amended and added to; other officials were enumerated as the subjects of bribery, and among them "any member of the common council or corporation of any city," and any person offending against either of the provisions of the preceding sections, was declared to be a competent witness against any other person so offending, and might be compelled to appear and give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons; but it provided that testimony so given should not be used in any prosecution or proceeding, civil or criminal, against the person so testifying."

The act of 1857 (section 52, *supra*) is confined to the city of New York, and relates only to bribes offered or given to mem-

bers of its common council, or officers of the corporation, makes every person offending against any of the provisions of that section a competent witness against any other person offending in the same transaction, and closes with an absolution or saving clause similar to that of the act of 1853, last cited.

In 1869 (Laws 1869, c. 742) an act was framed for "the more effectual suppression and punishment of bribery." It authorized certain actions in favor of parties injured, and by section 8 provided as follows: "No person shall be excused from testifying on any examination or trial for any offense specified in this act, or the trial of any action authorized by this act, or on any investigation by any committee of the legislature, or either house thereof, into the conduct of any member thereof, or on the trial of any civil action for slander or libel, or any criminal action for libel, where such alleged slander or libel imputes bribery, or any offense mentioned in this act, or on the trial or examination of any charge of perjury, committed in evidence given upon any such trial or investigation, on the ground that his testimony will tend to disgrace him, or render him infamous, or will tend to convict him of a criminal offense, or render him liable to be proceeded against therefor. But the testimony given by such witness on such trial or investigation shall not be used against him on the trial of any action, civil or criminal, against him. And nothing herein shall be construed as compelling any person to testify in any proceeding or trial in which such person is charged with crime."

Keeping in mind the compulsory and the protecting parts of the foregoing statutes, we come to the statute of 1881 (chapter 676), which establishes a penal code, and which, so far at least as the crime and proof of bribery is concerned, is in part a codification of preceding enactments. So far as the various provisions of these acts make the offender a competent witness, and relieve him from prosecution, they are formulated in section 79, already quoted: Pen. Code, sec. 79.

It is apparent from this history of progressive legislation that the word "investigation" cannot be treated as a word of mere amplification to broaden the sense of preceding words, but must be deemed the deliberate expression of an intent on the part of the legislature to bring in a distinct class of cases. Can there be any doubt as to the meaning of the legislature in the corresponding clause of preceding statutes?—in that of

1853 (chapter 217), requiring the party to give evidence before "any grand jury in any court," or, in chapter 539 of the same year, "before any magistrate, grand jury, or in any court," or in the act of 1869 (*supra*), "on any examination or trial, or on any investigation by any committee of the legislature, or either house thereof, into the conduct of any member thereof?" Each successive statute goes further than the preceding, one not including an examination before a magistrate, another including it, both obviously confined to examinations in the course of criminal procedure, but the last (1869) bringing in a new species, that of legislative investigation for a certain end, and of a certain described class. But other investigations than those relating to the conduct of its members were frequently entered upon or ordered by the legislature to be made through its committee, in pursuing which, testimony from witnesses was required, and we see no reason to doubt that the legislature intended, by the provisions of section 79, to cover all such cases, as well as those formerly provided for, when they involve an inquiry into matters relating to bribery as defined by the various sections of the Penal Code above referred to. The plain object of that statute was to enable these various tribunals, whether magistrates, grand juries, courts, or legislature, to make their investigations into alleged abuses effectual, and enable them to prosecute their inquiries successfully, and to that end protect witnesses whose testimony might otherwise be withheld, but without which the investigation would fail. No reason has been suggested for confining that protection to witnesses other than those who appear upon legislative investigations, and we are not permitted, by any rule applicable to the construction of statutes, to give the section in question such limitation as will exclude them. It could only be done by inference, and by importing into the statute words which the legislature did not choose to employ, and which express a meaning very different from the words actually used. This we are not at liberty to do. "What else," asks a learned judge, "is restraining by inference, or varying by interpretation, but to a certain extent recasting and remodeling the statute?—or in other words, invading the province of the legislature itself?" Williams, J., in *Garland v. Carlisle*, 4 Clark & F. 726. It certainly should not be permitted where the object of the act under examination was to extend the policy of existing statutes to new cases, and enlarge and not restrain its application, nor where the intention of the legisla-

ture is clearly expressed in words deliberately chosen, and where a literal construction does not take them beyond the mischief at which they were aimed. The case before us is not only within the words but within the spirit of the statute, and we are unable to find any doubt or ambiguity in its language which should deprive the defendant of a construction according to the manifest import of the words actually used.

We have not overlooked the contention of the respondent, "that sections 68 and 69 of the Penal Code, making the refusal of a witness to attend or testify before a legislative committee a misdemeanor," limit the inquiry to "material and proper questions," nor the argument thereupon, that a question which calls for a "criminating answer" is not a proper question, and the witness not obliged to answer. But we think that whatever effect may be given to these sections, they cannot be regarded as excluding the operation of the subsequent sections (78 and 79), which deal with the offense of bribery, and provide with minuteness for its punishment and the means of its discovery. The actual attendance of the witness and his disclosures are provided for, and it is clear that to make an investigation upon the subject of bribery effectual there must be some way of compelling both. Within the scope of those sections every question may be asked which is "pertinent" to the subject-matter, and whether it is or not pertinent will be the only question. The statute relieves the witness, and it will not be necessary for the examining or investigating tribunal to concern itself with the effect upon him. If this were not so, the whole object of the legislature might be obstructed by the neglect or refusal of witnesses to obey the subpoena or answer the questions of the committee. That those put on the investigation, the results of which are now before us, were pertinent, is apparent from the use made of the answers thereto upon the prosecution of the person who then testified. If the observations already made are correct, it follows there was error in receiving them against his objection.

2. Another exception brings up the ruling of the court as to evidence from one Pottle, proving a corrupt proposal by the defendant in 1883. The witness was at the time engrossing clerk of the assembly, and the defendant desired an alteration of a certain bill then pending before that body in reference to street railways, so that its terms might authorize the construction of a railroad on Broadway. For this alteration

he proposed to pay the witness five thousand dollars. We are unable to find any ground on which the evidence was admissible. It was introduced as part of the affirmative case which the prosecution were bound to carry to the jury. Its admission is justified upon this appeal by various propositions presented by the people. First, say the learned counsel: "We suppose that every criminal trial begins with a presumption of innocence in favor of the accused. This presumption must be founded on the moral rectitude or fear of the law, or both, whichever the person is supposed to possess. The presumption must be overcome before conviction can be had. Jacob Sharp was accused and brought to trial for bribing the aldermen of the city of New York, and by that means procuring the grant of a valuable right. Evidence was offered to show that not long before he had attempted to bribe another official person to do an act which, as he thought, would promote the scheme which he had so long pursued. This evidence being given proved beyond a question that no sense of right and wrong, no fear of law or punishment, would deter him from committing the offense of bribery for the one purpose which he had in view in all his efforts. . . . The evidence objected to proved the irresistible strength of the motive as against all other motives which might have deterred him, and upon which the presumption of innocence is founded."

This view cannot be sustained; the commission of a crime by Sharp in 1884 was distinctly in issue. It was bribery, but the subject was Fullgraff, a member of the common council. Of the commission of that crime the law presumed Sharp to be innocent. If Sharp had given evidence of good character, the prosecution might have answered that evidence by proof that his character was bad, but I believe it has not been thought by any judicial tribunal that such evidence could be given in anticipation of proof from the defendant, nor that an issue upon it could be tendered by the prosecution: *People v. White*, 14 Wend. 111; *Webster's Case*, 5 Cush. 295; *De Witt v. Greenfield*, 5 Ohio, 227; *Commonwealth v. Hopkins*, 2 Dana, 418; Burroughs on Circumstantial Evidence, 533. But even in the case I have supposed such evidence would be of general reputation only, and not of particular acts by which reputation is shown.

The effect of the argument for the people is, that the evidence shows a disposition to commit the crime, — that is, a criminal disposition. If that is a different view, it is equally

inadmissible. A man's general character may perhaps be so bad as to permit an inference that evil and good have to him the same meaning, and that it is a matter of indifference by which he accomplishes his purpose. In a judicial proceeding, however, proof of that would be irrelevant, although it might show, in a moral sense, that he would be likely to commit the crime with which he was charged. The person charged might as well seek to repel the imputation by proof of particular acts performed by him at other periods of his life, and a cause submitted to a jury be made to turn upon the preponderance of proof on one side of antecedent bad conduct, and proof on the other of virtuous acts. Legally speaking, it would be unsafe to draw a conclusion from either. We are referred to no case holding that upon the trial of an indictment charging a specific crime, committed in a specific way, evidence that the accused was of a particular character would be relevant. Moreover, counsel on both sides seem to agree that the commission of one crime is not admissible in evidence on the trial of the same offender for another crime. It is, indeed, elementary law that no evidence can be admitted which does not tend to prove the issue joined, and the reason and necessity of the rule are much stronger in criminal than in civil cases for the observance of this rule and of confining the evidence strictly to the issue. The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise, and do him manifest injustice by creating a prejudice against his general character. How, then, is this case to be taken out of this general rule of law? The learned judge, in submitting the case, desired the jury to consider the Pottle evidence "as only showing the zeal which the defendant exhibited," and not allow themselves to be prejudiced by his testimony in regard to the offer of a bribe, saying: "It is only to be considered as showing, like other evidence in the case, the extent of the defendant's feeling, interest, and desire"; adding: "I should be sorry if the fact that Pottle testified to the offer of a bribe should be otherwise considered. . . . So far as it tends to throw any dark shadow upon the character of the defendant, I desire you to eliminate it from your consideration, and treat it merely as evidence tending to show depth of interest, motive, and desire."

These remarks not only answer the respondent's argument,

but point to the danger which might follow from the evidence. They were obviously inadequate to prevent it. Nor does the discrimination between crime proven and a conversation make the evidence less objectionable. As presented to the jury, it was distinctly a crime committed. The point of inquiry was that, and it was plainly so avowed by the counsel for the people. He brought the witness Pottle and Sharp together; proved by him that he then had the "general surface railroad act in his possession as engrossing clerk"; that he had a conversation with Sharp "in relation to the bill"; that he had a conversation with him "on the subject of the bill including or not including Broadway as one of the streets in the bill." Then asked, "Had you any conversation with him as to whether he did or did not desire to have Broadway included as one of the streets in the bill?" The defendant's counsel objected, but the objection was overruled and an exception taken, and the witness replied, "I did." He was then asked to state "all he [Sharp] said on the subject," and the counsel for the defendant asked "to be informed to what point the evidence is to be directed," saying "there is a particular purpose in this question, and I think we might properly be advised what it is." After some discussion, the district attorney said: "I intend to prove that Pottle was sent for by this defendant; that he went to defendant's room; that this defendant thereupon offered Mr. Pottle the sum of five thousand dollars to add to one of the sections of that bill the words 'Broadway and Fifth Avenue,' permitting a horse-railway company to be constructed upon those streets; that Pottle declined the proposition, and that Sharp then offered the same sum in case he would give him the original bill; that is what I desire to prove"; whereupon defendant's counsel said: "We object to it upon the ground that it is evidence of an utterly distinct charge of crime." The court said: "Upon the whole, my judgment is that the evidence is admissible."

A careful examination of the evidence given by Pottle authorizes the comment of the appellant's counsel that "it was not part of the conversation, but that it was the whole." Unless admissible as proving an attempt to commit a crime, it is wholly immaterial, and as proof of a crime, it was irrelevant, and must have been very prejudicial to the defendant. It showed a capacity or willingness to commit bribery in 1883, to induce an act from which Sharp might be benefited as one desiring the construction of the road, but which, in fact, gave

him no advantage over other citizens. It gave him no franchise; but it could not fairly be inferred from such premises that in 1884 he did also bribe a different person for a different purpose. The inference would be purely conjectural. The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. It is not moral evidence even. The fact under investigation, in its circumstances, was entirely unlike the fact disclosed by the witness. There is no analogy between them. Yet the inference drawn by the prosecuting officer, and permitted by the court, left it for the jury to say that the desire of Sharp manifested by the offer of a bribe in one instance was the same desire which led to the actual giving of a bribe in the other; hence, that the two crimes have the same origin. Evidence of moral character is admitted to disprove the existence of a criminal motive, or to rebut evidence of it, but evidence of a prior crime can have no legitimate place in an investigation as to whether a subsequent crime was committed by the same person. If it had been proven that Sharp had in fact given the money to Fullgraff, and the question was as to its being an innocent or criminal act, a gift which he had a right to make, or which he made corruptly, the fact, if it were a fact, that he sought to attain a similar end by bribery, might seem to show the intent with which the act charged was done. But here the very thing in dispute was whether he gave the money, and that upon a former and different occasion he had offered money with a guilty purpose to another person could not fairly be held as relevant to that question. Moreover, it had been distinctly conceded by the defendant that he desired to secure the franchise for the Broadway Surface railroad, and therefore, evidence of his commission of a crime for the mere purpose of showing that desire was wholly unnecessary, and we may repeat here the language of Allen, J., in the *Coleman Case*, 55 N. Y. 81, upon a similar question: "It was idle and frivolous to put in this evidence for the purpose avowed, while its influence could not be otherwise than damaging to the prisoner." It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds, colored and deepened, if it did not distort the subsequent evidence.

It did, indeed, cast a dark shadow upon the defendant's character; it not only tended very strongly to prove the defendant guilty,—it was absolute proof,—but it was of a differ-

ent crime from that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and mislead them. It was, we think, improperly received, and the exception to its admission well taken.

3. We are also of opinion that there was error in the examination of the witness Miller. He was an alderman at the time of the passage of the resolution, but we do not find he was a party to any agreement concerning its passage. Against the objection of the defendant, he was allowed to testify that, after the "consent" was given, he received from De Lacy five thousand dollars. The district attorney then asked: "You understood, did you not, that you received that money from De Lacy on account of the Broadway Surface railroad?" A. "No, sir; nothing of the kind." A further examination as to the circumstances and the time of its receipt followed, and the witness said De Lacy gave me a roll of bills, "and said there is something to buy election tickets with." Asked by the district attorney: "Did you not understand at the time it was paid on account of the Broadway railroad company?" A. "No, sir; I had no understanding of that kind with him." Q. "What was your understanding at the time?" To this question there was not only the specific objection that the evidence asked for was incompetent against Sharp, but the further objection that it was asking for a conclusion. The court allowed it, and the defendant excepted. A. "There was no particular understanding about it, so far as I was concerned. There was nothing said about it." Q. "What did you think, at the time, De Lacy gave it to you for?" The court held this competent. Witness: "What did I think?" District attorney: "That is the question asked you." A. "About what?" District attorney: "As to what De Lacy gave it to you for." A. "Well, I had my misgivings." District attorney: "Tell us, what did you think at the time what he gave it to you for?" Witness: "I supposed it was for the Broadway road." It is quite impossible to find any ground on which the exception taken can be overcome. The transaction was not with Sharp. The question called for no fact, but with frequent iteration for an opinion,—a supposition. Its importance, in the estimation of the people, is manifest from the repeated and persistent attempts to obtain it. The court below were of

opinion that the ruling was erroneous, but that the jury could not have given any effect whatever to the mere expression of opinion or supposition of the witness, because the whole transaction between De Lacy and the witness was afterwards given. It was, but the narration also was received under an objection, and was excepted to. It certainly did not cure the difficulty. The question to be settled was, whether the money was part of the fruits of a corrupt agreement, whether the transaction was an incident of the scheme with the formation of which the defendant was charged, whether the alleged fact of bribery was true; and this, like any other question of fact, was to be settled by evidence. The opinion, the thought, the understanding of the witness, was not evidence. The jury might, however, naturally reason that the conclusion of the witness, drawn from all the facts within his own knowledge, fairly represented the nature and the extent of the connection between the circumstance to which he testified and the fraudulent practices which had preceded it. It was admitted because claimed to be relevant and material by the prosecuting officer and the court; and whether in any or in what degree it did affect the jury cannot be known. The payment of a large sum of money to the witness was a palpable fact. Whether it was paid to him in his capacity of alderman, or in connection with or on account of the consent obtained from the board of aldermen, could not properly be answered by the jury upon the suspicion or conjecture of the witness. That it was not so answered we cannot say. The respondent's counsel, however (the district attorney), argues that the question was proper, but that the answer was not responsive. The interlocution between the witness and the prosecutor seems to indicate that there was no misapprehension on the part of the witness, and that the answer was the answer called for by the question, and directly fitting to it. The learned counsel did not stop his examination after proving the receipt of the money, but sought the mental conclusion of the witness as to the consideration of or inducement to the gift; and the answer was accepted by him.

4. The public prosecutor, to make out the case, and as part of his evidence in chief, offered to show by a detective officer that he had been employed by the district attorney to serve subpoenas upon Maloney, Keenan, and De Lacy, all of whom the district attorney claimed to be material and competent witnesses, and to show further that the detective was unable

to find them in this state, but did find Maloney in Canada, and there served him with a subpoena, and learned that the others were in Canada also, although he did not see them. These persons were named in the indictment as co-defendants with Sharp, and the evidence already in tended to show that some of them, and especially Maloney, were intermediaries between the persons offending against the provisions of the statutes relating to bribery, or instruments of whomever committed the act charged.

The evidence was objected to by defendant's counsel, but admitted. It was not claimed by the prosecution that the defendant was privy to their absence, or that the object of the proof was to furnish a basis for evidence otherwise inadmissible. The learned district attorney disclaimed any intention "of proving the flight of these persons as co-conspirators," and so make use of their absence as evidence of guilt, or an admission by their conduct that the accusation against them and the defendant was true, but said he offered it only for the purpose of showing that after diligent effort he was unable to procure their attendance as witnesses, and thus enable him to account for their absence.

His claim is, that they were depositaries of the direct proof of the conspiracy which the prosecution were engaged in establishing, and accomplices of the defendant. The evidence already in was, so far as Sharp was concerned, altogether circumstantial, but tended to show that the persons named, or some of them, were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue. We think evidence of their absence was inadmissible. It could have no legitimate bearing upon the issue, and the danger is very great that such testimony will prejudice a party against whom it is offered. It may be, and frequently is, admissible in answer to evidence from the other side which would naturally call for an explanation. But the absence out of the jurisdiction of the court of an associate, or one seemingly connected with the defendant in the act charged, is easily construed as evidence of guilt, and unless the occasion calls for such proof it should not be allowed. It is an old maxim that "he confesses the fault who avoids the trial," but in its application, even to the fugitive, there is great danger of error. A man may avoid the trial from many motives besides consciousness of guilt, but however actuated his conduct can in no degree, in a court of justice, reflect upon another. Its

admission in this case was virtually saying to the jury, "there is better evidence, and it might be had from the defendant's associates; it is not the fault of the prosecution that the evidence is not before you, but because of the voluntary act of those who, with the defendant, stand charged with the offense." Thus the non-production of the witnesses is made to supply the place of proof of the issue; with that issue the evidence had no possible connection. The rule is, that where a party to an issue on trial has proof in his power, which if produced would render material but doubtful facts certain, the law presumes against him if he omits to produce that proof, and authorizes a jury to resolve all doubts adversely to his defense.

But the rule cannot be applied unless it appears that the proof, whether it is a living witness or paper, is within his power. It is easy to see that the evidence offered here might be used for an ulterior purpose, although not pressed by the prosecution, yet entertained and made effective by the jury; and there certainly could be no presumption that the prosecution had the power to produce any particular witness, certainly not one of those named, nor did the law require it of them. It is therefore impossible to find any reason for or lawful purpose to be gained by the proof offered, and its admission was a very dangerous innovation upon the general rule, which excludes it as irrelevant to the issue. Nor was it a mere question as to the order of proof. It was introduced as affirmative evidence, and while it could do the prosecution no legal good, must subject the defendant to the prejudices and unfavorable inferences suggested by the absence of a co-defendant whose presence, if innocent, could not but assist the defendant, but whose absence and refusal to obey a subpoena might easily be regarded as a confession of guilt, and could not fail to strengthen in an appreciable degree the case of the prosecution. The only case cited in support of the ruling is *Pease v. Smith*, 61 N. Y. 477. That was a civil action. The absent witness was confined in a state prison, not by his own consent; and whatever may be said of the decision, it has no application here, nor should it be extended to other circumstances than those there disclosed.

It is also said by the district attorney that the defendant upon cross-examination of one of the prosecutor's witnesses had shown the absence of one of these persons, and that he was in Canada. The same fact as to all of them seems to

have been assumed as if already before the jury. Why, then, was the evidence insisted upon? In answer to a question from the learned trial judge, whether the defendant would not "have a right to argue to the jury in summing up that in view of all the testimony the people should have called Maloney," the defendant's counsel said: "No, sir; how could we argue that, when we know already from the opening of the district attorney that Maloney is not accessible to a subpoena," and disclaimed any intention of so doing, or that it "could be done in common fairness," with such earnestness that it is very difficult to see why the introduction of the evidence was pressed, if no other purpose existed than to escape the imputation of keeping back testimony. Proof even of the absence of these persons was inadmissible. But that was not all. The proof was not only of their absence, but of unavailing search by a detective, the service of a subpoena upon some of them, and the failure to obey its mandate. Under the circumstances of the case, the ruling of the court in this instance may not have been of much importance, and upon it alone we should not grant a new trial. But the legal principle which requires relevant and material evidence, and admits no other, is important, and however serious the charge against an accused person may be, and however great the evil it uncovers, he cannot properly be made the subject of a judicial sentence, unless the crime is substantiated according to the established rules of evidence. The other exceptions above referred to point to violations of those rules to the manifest prejudice of the defendant, and to the benefit of those exceptions he is entitled. They require a new trial, and that it may be had the judgment of the court below and the conviction should be reversed, and a new trial granted.

PECKHAM, J. It seems to me that the admission of the evidence given by the witness Pottle was error. There is not room for much discussion in regard to the general principle upon which evidence that proves or tends to prove the prisoner guilty of other felonies or misdemeanors is admitted. It is conceded on all sides that the admission of such testimony forms an exception, and a very material and important exception, to the general rule of evidence.

The general rule is, that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under

ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor. Whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is. Thus there is a class of cases in which evidence is admitted where it is material to show guilty knowledge of the character of the act committed by the prisoner. A good illustration of this class of cases is in the trial of an indictment for passing counterfeit money. Evidence of the passage of like money within a reasonable time before or after the commission of the offense for which the prisoner is on trial, is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. A man might think the money he passed was good, and he might be mistaken once, or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit. Hence evidence of such repetition bears directly and materially upon the issue before the jury. To this same class would belong the case of an indictment for shooting an individual. For the purpose of proving that the shooting was not accidental, where such a fact is claimed, evidence may be given of efforts, or even threats, made by the defendant to shoot the same individual on prior occasions. Thus the probability of the shooting being accidental is lessened by showing prior efforts or threats to accomplish the same act for which the prisoner is on trial. Cases of embezzlement and of obtaining money or other property by false pretenses come under the same general rule. A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility perhaps, that the entry was a mistake, but the probability of such mistake would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person.

Then there is another class of cases in which the facts show the commission of two crimes, and that the individual who

committed the other crime also committed the one for which the defendant is on trial. Evidence is then permitted to show that the defendant was the person who committed the other crime, because in so doing, under the circumstances, and from the connection of the defendant with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial. Another class in which evidence of this nature is admissible is, where it is proper for the purpose of showing a motive for the commission of the main crime.

It is claimed in this case that the evidence was admissible on the ground that it showed or tended to show the intent on the part of the prisoner in paying the money to Fullgraff after proof had been received that money was given him, and also upon the ground that it tended to show the motive of the defendant for the commission of the crime. If this evidence did materially and directly tend to show either such intent or motive, and if it were not too remote in point of time, and if it logically connected the fact to be proved with the main transaction, then it may well be that it was admissible, even though it tended to prove the defendant guilty of another and separate offense. The admission of the evidence of Pottle seems to me, however, to carry the principle further, and to a much more dangerous extent than any other case that has come under my observation.

Upon the question of the intent with which the money was paid to Fullgraff, the evidence, I think, falls far short of such logical and close connection therewith, as is necessary to render it admissible. The fact being established that such payment was made, and that the defendant was connected with its payment, the intent could not be a matter of any real doubt. That it was paid to obtain the vote of Fullgraff as an alderman for granting the franchise to the Broadway Surface railroad, could not be made a subject of honest discussion. All the evidence was to that effect, and there was absolutely no evidence to the contrary, and to offer evidence of the commission of another crime for the avowed purpose of thereby showing the intent with which this money was paid to Fullgraff would have made to my mind a clear case of offering it on a colorable issue, and using it for another and wholly inadmissible purpose. However that may be, the evidence was not admissible even on the question of intent.

As is very well said by Mr. Justice Agnew in *State v.*

Lapage, 57 N. H. 245-295, 24 Am. Rep. 69: "It should also be remarked that this being a matter of judgment, it is quite likely that courts would not all agree, and that some courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the courts have always professed to put the admissibility of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other."

Judge Earl, in the case of *People v. Shulman*, reported in a note to *Mayer v. People*, 80 N. Y. 364, at 376, states as follows: "But there is one general rule which must apply to all such cases. There must be in the transaction thus sought to be proved some relation to or connection with the main transaction; that is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature to show guilty knowledge at the time of the main transaction." And in the case of *Mayer v. People*, *supra*, which was the case of an indictment for obtaining goods by false pretenses, Rapallo, J., in speaking of the admissibility of testimony of this nature upon the question of intent, said: "That when the representations, their falsity, and the knowledge of the accused that they were false, is established by competent testimony, the allegation that they were made with intent to defraud may be supported by proof of dealings by the accused with parties other than the complainant, which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general transaction."

Under such conditions and guided by such rules, it does not seem to me that this evidence by Pottle was so connected legitimately with the main transaction—that of the alleged bribery of Fullgraff—as in any way to characterize the intent with which the money was alleged to have been paid Fullgraff, in any other sense than the evidence tends to show capacity upon the part of the defendant to commit the crime, because he had months before attempted to commit one of a similar nature with another person for the purpose of accomplishing another act.

It is a very general and extremely broad, and I think a

dangerous, ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was so desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the defendant was capable of committing the crime alleged in the indictment, because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place, and to accomplish the commission of another act. It throws light upon that intent only, as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice instead of by evidence showing the actual commission of the crime for which the defendant is on trial.

Upon the question of motive, using that word in the sense of a reason why the prisoner should commit the crime, I do not see that it has the least materiality or bearing. It shows and tends to show no such reason. It only tends to show that the prisoner took an interest in the inclusion of Broadway in the bill permitting railroad tracks to be laid in the streets of cities. It might be argued, therefore, that he took an interest in or had a desire for a railroad in that street. As a reason or motive for such desire the evidence in no aspect tends to enlighten us. By the passage of the act of 1883, the prisoner would have had no greater right than any one else to obtain the road. Others could compete for it as well as a corporation in which he was interested. No reason for any interest in this question is shown by this evidence. It is the simple, bald, and naked proposition which the evidence is claimed to prove,

viz., the interest of the prisoner, and this interest is to be established by proof of the commission of a crime under the circumstances detailed, and months before the commission of the one charged in the indictment. This cannot be said to prove or tend to prove a motive for the commission of the crime in question within the meaning of the law, while upon the question of mere interest or desire the evidence is too remote and too dangerous to be permitted.

One of the cases cited upon this branch of the argument was that of *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524. There the prisoner was charged with murdering one Withey, who was a married man. The prisoner was also a married man. Evidence had been given of intimate relations, though not necessarily criminal, between the prisoner and Withey's wife, before the death of the deceased. After the murder the prisoner took the widow and her sister to the house of a friend in the evening, and came away with the widow late that night alone. A few days after the murder the prisoner disappeared from the neighborhood. It was then proved by a witness from Michigan, who was a clergyman, that the prisoner and the widow of Withey appeared before him and were married, and that the prisoner declared on oath before him that he knew of no legal obstacle to his marriage with the woman, and thereupon he married them. This evidence was objected to, on the ground that it had no direct or material bearing upon the main question in the case, and that it simply tended to prejudice the prisoner by proving him guilty of another and separate felony. The evidence as to the murder was circumstantial, and this court held that the evidence in controversy was proper for the purpose of proving a motive for the murder. In that case the evidence showed a direct and logical connection between the murder of the deceased and its perpetration by the prisoner. It showed that the prisoner had a passion for the possession of the wife of the deceased, and that for the purpose of obtaining possession of her person, he did commit the crimes of perjury and bigamy, and to accomplish this possession of the woman, the taking off of the woman's husband was an obvious necessity. The motive of the prisoner was the desire for the woman, and the strength of that desire, in other words, the strength of the motive which impelled the murder, was shown in this way.

The case of *People v. Wood*, 3 Park. Cr. 681, was also cited. That was a special-term case, which arose upon

an application to the learned justice who delivered the opinion for a stay of proceedings upon the conviction of the defendant for murder. Evidence had been given of separate and distinct felonies committed by the prisoner for the purpose of showing motive on his part in the killing of the deceased. The learned court held that the evidence was admissible because it tended to show with other evidence that the felonies were parts of a single transaction, influenced by a single motive and design to accomplish a single object; that they were all connected by unity of plot and design, and if proved, would tend to show the motive which actuated the prisoner in taking the life of the person stated in the indictment. In that case the evidence tended to show that each felonious act was a necessary one for the purpose of carrying out the main object which then existed in the mind of the prisoner, and that all of them formed but one transaction and were connected together as parts of one whole.

Now, the evidence in the case at bar was of no such character. At the time of its alleged occurrence no law had been passed. It did not appear and could not appear that at that time any law ever would be passed. It was an act remote in point of time, different in purpose, and of an entirely separate and distinct matter, forming no part of one main transaction, and to my mind coming nowhere near the standard for the admissibility of such evidence, pronounced by all the cases which I have been able to find.

The case of *Stout v. People*, 4 Park. Cr. 132, contains the same general principles. There, evidence was admitted to the effect that the prisoner was seen in bed with the wife of the man he was charged with murdering, although such wife was also the prisoner's sister, and it was admitted as furnishing a motive for the prisoner to get the husband out of the way. I have looked at the other cases referred to by the learned counsel for the prosecution, and find that they come under the designation of one or the other of the classes already referred to. *Commonwealth v. Tuckerman*, 10 Gray, 173, 199, was a case of embezzlement, and evidence of other embezzlements from the same party during a series of years, and contained in a statement made by the prisoner, was admitted.

Commonwealth v. McCarthy, 119 Mass. 354, was an indictment for arson. To prove the intent of the prisoner, evidence was received that on two prior occasions the prisoner had set

fire to a shed ten feet distant from the building destroyed, and connected therewith by a flight of stairs. This had a direct tendency to prove that the firing was not accidental, but intentional and felonious.

Commonwealth v. Bradford, 126 Mass. 42, was an indictment for arson, and the same class of evidence was received, and for the same purpose.

Commonwealth v. Merriam, 14 Pick. 518, 25 Am. Dec. 420, was an indictment for adultery. Evidence of improper familiarity between the defendant and the same woman shortly before the act in question was admitted. The evidence was admitted on the ground that intimacy and these acts of familiarity with the same woman had a tendency to establish the fact of the adultery charged in the indictment. Evidence tending to show previous acts of indecent familiarity would have a tendency to prove, in the case of the same woman, of course, a breaking down of all the safeguards of self-respect and modesty, and hence a gradual preparation of the woman to lend herself to the commission of the crime.

The case of *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, forms no precedent for the admission of the evidence in this case. We simply held that upon the trial of the defendant for the crime of rape it was competent to prove that he had attempted to commit the same crime upon the same woman a short time prior thereto. It was put upon the ground that upon trial of a person for a particular crime it is always competent to show upon the question of his guilt that he had made an attempt at some prior time, not too remote, to commit the same offense. It was said further that it would be incompetent to prove that the defendant had committed or attempted to commit a rape upon any other woman. And it was stated that upon the trial of a prisoner for murder it is competent to show that he had made previous attempts or threats to kill his victim, and hence upon the same principle it was held that when charged with rape it was competent to show that the defendant had previously declared his intention to commit the offense, or made an unsuccessful attempt to do so.

In the case of *Commonwealth v. Abbott*, 130 Mass. 472, upon an indictment for murder, proof was offered on the part of the prisoner of former ill feeling of the husband of the deceased toward the deceased. It was rejected as too remote and disconnected with the crime charged; particularly as there was

evidence of the parties living together on good terms long subsequent to the time of this alleged ill-feeling. This is certainly no precedent for the admission of the evidence in question in the case at bar.

In *Commonwealth v. Jackson*, 132 Mass. 16, the prisoner was indicted for selling property by false representations under the Massachusetts statute. Evidence of sales of other property of a like nature to other persons under representations proved false was admitted for the purpose of showing the intent with which the representations in question were made. The supreme court of Massachusetts held that the evidence was inadmissible, and that for the error of its admission a new trial should be granted. The case is cited only for the purpose of quoting the opinion of the court upon the danger of this kind of evidence.

Devens, J., writing the opinion, said that "the other statements made by the defendant at other times as to the other animals which he sold might have been false, while those made in the case for which he was tried were not. The transactions formed no part of a single scheme or plan any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons. Even if they were transactions of the same general character, they differed in all their details, and the defendant was compelled to defend himself against three distinct charges in addition to the one for which alone he was indicted. Evidence of the commission of other crimes by a defendant may deeply prejudice him with the jury, while it does not legally bear upon his case. It certainly would not be competent, in order to show the intent with which one entered a house, or took an article of personal property, to prove that he had committed a burglary or larceny at another time." He further said in the same case: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions creates a prejudice which may cause injustice to be done him." I think the remarks are very pertinent in this case. The reasoning herein leads to the exclusion of evidence as to past

offenses, such as Pottle's evidence tends to prove, whether it is directed towards proving the bribery of clerks to committees or members of the legislature of 1883 or 1884.

Upon the same basis it is difficult to see the materiality or admissibility of the evidence that the prisoner, after the passage of the act of 1884, paid to Phelps the fifty thousand dollars, as testified to by Phelps. The evidence, it can be seen, had a tendency to greatly prejudice the prisoner upon the issue of his guilt of bribing Fullgraff, while wholly inadmissible for any such purpose, and it would seem to be quite questionable to admit it for the purpose of proving an interest in a Broadway railroad, about which there could be and was no dispute or contradiction. We call attention to the question without absolutely deciding it.

We are quite clear that errors have been committed by the admission of evidence in this case, at war with the well-settled law on the subject. That law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter for the purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law all are innocent until convicted in accordance with the forms of law, and by a close adherence to its rules.

For the reasons above given, as well as upon all the grounds so well stated in the learned opinion of my brother Danforth, I am in favor of reversing this conviction, and granting a new trial.

Judgment reversed.

POWER OF LEGISLATURE TO COMPEL WITNESSES TO ATTEND AND SUBMIT TO EXAMINATION. — "Each house must also be allowed to proceed in its own way in the collection of such information as may seem important to a proper discharge of its functions, and whenever it is deemed desirable that witnesses should be examined, the power and authority to do so is very properly referred to a committee, with any such powers short of final legislative or judicial action as may seem necessary or expedient to the particular case. Such a committee has no authority to sit during a recess of the house which has appointed it, without permission to that effect; but the house is at liberty to confer such authority if it see fit. A refusal to appear or to testify before such committee, or to produce books or papers, would be a contempt of the house; but the committee cannot punish for contempts; it can only report the conduct of the offending party to the house for its action": Cooley's Const. Lim. 164. But the power of a legislature to compel the attendance of witnesses, and to require them to answer questions, is limited to the proper

subjects of legislative inquiry and action. If a witness is committed for contempt by a legislative body, any court before which he is brought on *habeas corpus* will inquire into the cause of his commitment, and will order his release if his imprisonment is improper. As was said by the supreme court of the United States in *Kilbourn v. Thompson*, 103 U. S. 190: "Whether the power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which that house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

WITNESS, PRIVILEGE OF: See note to *Fries v. Brugler*, 21 Am. Dec. 55-62.

WHITE v. KUNTZ.

[107 NEW YORK, 518.]

ACCEPTANCE OF LESSER SUM DOES NOT, ordinarily, bar a demand for a greater.

COMPOSITION OF DEBTOR WITH HIS CREDITORS, IN WHICH THEY AGREE to accept less than their entire demands, is binding on them. A composition deed is in its spirit an agreement between the creditors themselves, as well as between them and their debtor.

AGREEMENT IN FAVOR OF CREDITOR WHO HAS UNITED IN COMPOSITION DEED, whereby he is to obtain any advantage over the other creditors, to which they did not assent, is void, and therefore not enforceable by any action.

COMPOSITION AGREEMENT IS MADE VOID AS AGAINST ALL INNOCENT PARTIES thereto, by any agreement between the debtor and one of his creditors whereby the latter is given any preference over the others.

CREDITOR GUILTY OF FRAUD IN COMPOSITION AGREEMENT by stipulating for a secret preference in favor of himself is bound by such agreement, and can obtain no immunity therefrom by proving other like frauds in such agreement, of which he was not advised at the time of its execution.

ACTION against Joseph, Louis F., and Michael Kuntz. The amended complaint stated that the two defendants first named were, in January, 1881, indebted to plaintiff on two promissory notes in the sum of \$18,164.64, and in the month of April following, they made an assignment for the benefit of creditors to their father, and co-defendant Michael Kuntz; that afterwards a composition agreement was entered into between them and their creditors, whereby the latter were to accept thirty-three and one third cents on the dollar, for which notes were to be given by Joseph and Louis, and indorsed by Michael Kuntz; that pursuant to the composition, four notes, aggregating \$6,043.78, were executed and delivered to plaintiff; that to induce plaintiff to sign such composition, the

defendant Michael previously agreed to purchase the four notes, and pay plaintiff \$10,000 therefor; that on being tendered such notes, the defendant Michael refused to purchase the same, and claimed that his agreement so to do was null and void; that various other creditors who signed such composition agreement were induced to do so by promises made by said Michael to pay them larger sums than expressed in such agreement; that the plaintiff now brings into court, and offers to surrender, the four composition notes received by him, and also the agreement entered into between him and the said Michael. Plaintiff asked that the composition agreement be set aside; that the four notes given him be canceled; and that he have judgment for the amount of the two notes originally held by him. A demurrer interposed to this complaint was sustained, and the judgment sustaining it was affirmed by the general term.

A. Blumenstiel, for the respondents.

William Barnes, for the appellant.

By Court, EARL, J. It is a general rule of law that the acceptance of a lesser sum, or an agreement to accept it, does not bar a demand for a greater sum. There is an exception to this general rule, however, in the case of a composition by a debtor with his creditors, in which they agree to accept less than their entire demands. Such an agreement, if entered into by a debtor with a number of his creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each in that case has the undertaking of the rest as a consideration for his own undertaking. "Where creditors thus mutually agree with each other," says Mr. Justice Daly, in *Williams v. Carrington*, 1 Hilt. 514, 519, "the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his own claim, it would operate to the detriment of the other creditors, who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive, by putting it out of the power of the debtor to carry out the composition." "Every composition deed," says Mr. Justice Duer, in *Breck v. Cole*, 4 Sand. 79, 83, "is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them

and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid and given, and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." It is, therefore, held that every agreement made by one creditor for some advantage to himself over other creditors, who unite with him in a composition of their debts, is fraudulent and void. So scrupulous are courts in compelling creditors to the observance of good faith toward one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative; and no contract to pay money or do any other valuable thing, and no security given upon any such promise, whereby a creditor obtains an advantage peculiar to himself, can be enforced: *Russell v. Rogers*, 10 Wend. 474, 479; 25 Am. Dec. 574.

Hence the agreement on the part of Michael Kuntz made with the plaintiff, without the knowledge and consent of the other creditors, to pay him ten thousand dollars for the four notes amounting to about six thousand dollars, was fraudulent and void and cannot be enforced. And the composition agreement as to all the innocent parties thereto was absolutely void, and they were left with the right to enforce their original claims as if they had never signed the agreement. If the plaintiff, therefore, were an innocent party, and guilty of no fraud, he could, first repudiating the agreement, have commenced an action at law upon his original notes, and have recovered judgment thereon, and the composition agreement would have been no defense as to him. But he is not an innocent party. He was himself guilty of the very fraud of which he complains, and he cannot therefore allege that he was induced to enter into the composition in consequence of any fraud practiced upon him. He executed the composition agreement knowing that there was not to be equality among the creditors, and hence he cannot be permitted to complain that there was not such equality. Having himself taken a fraudulent advantage, he cannot set up that other creditors also took a fraudulent advantage. Having made the best bargain he could for himself, he cannot complain that other creditors did the same. The only persons who can complain of these frauds are the innocent parties to the agreement.

What, then, are the rights of the plaintiff in the dilemma in which he has been placed? He has not forfeited all claims upon his debtors, and there is no ground upon which he can be deprived of all remedy against them. He must either have the composition notes or his original notes. If as to him the composition should be held fraudulent and void, then he could not enforce the composition notes, but would inevitably be left with his action upon his original notes. Having by his signature to the composition induced other innocent creditors to sign also in the belief that all the creditors were to be treated alike, while in fact he was to receive a large advantage over them, he perpetrated one fraud upon them; and if he could now avoid the composition agreement as to him, and enforce his original notes for their full amount, he would perpetrate another fraud upon them, and take a still further advantage of them by depleting the very fund out of which alone perhaps the debtors would be able to fulfill the composition on their part. This he should not be permitted to do, and to defeat such an unjust result he should be held to the composition and his remedy upon the composition notes. The courts would not as between the parties guilty of the fraud, if their interests alone were to be affected, enforce or relieve from the composition agreement. But they will see to it, so far as they can, that the innocent parties are not made the victims of a double fraud, and this they will accomplish by holding the guilty parties to the composition agreement; and so it was held in *Mallalieu v. Hodgson*, 16 Ad. & E., N. S., 690, a case quite analogous to this. There, as here, the plaintiff, before signing a composition agreement, stipulated for a secret advantage to himself, and so did some of the other creditors unknown to him, while it was represented to him by the debtors that all the other creditors were to have no more than the composition agreed upon. Earl, J., said: "Here the plaintiff, having received the composition and the value of the preference, which was a fraud upon the other creditors, is seeking to gain a further exclusive advantage to himself, also in fraud of them, by suing for the balance of his original debt, after allowing for the composition and the value of the preference, and claims to avoid his release on the ground that he was induced by the defendants to believe that he alone was fraudulently preferred, whereas some other creditors had also obtained some unjust advantage. But a deed is not to be avoided on the ground of a fraudulent misrepresentation, unless the matter misrepresented was a material inducement to

the execution of the deed." Coleridge, J., said: "As the plaintiff was himself, in the transaction of the composition and release, guilty of fraud in respect to the other compounding creditors, by stipulating for a preference to himself, he is not at liberty to insist on the fraud at the same time practiced on himself; nor, indeed, to say that it is any fraud which induced him to enter into the composition. . . . The plaintiff in this case has entered into an arrangement for the compounding of his claim on the defendants, which is fraudulent as regards the other creditors. He has received the composition notes, and has executed a release; but he now resorts to his original demand, and is thereupon met by a plea of the release. *Prima facie* the release is an answer to the action, because to allow the plaintiff now to recover for his whole original demand would be a fraud on the other creditors who have come into the composition on the faith of the plaintiffs being a party to it."

As to the secret advantage given to some of the other creditors to induce them to sign the composition, the learned judge further said: "The plaintiff has stipulated and obtained a preference for himself which, for the reason I have stated, will not vitiate the release as against himself, and it appears to me that the having given a preference to others was also no fraud upon the plaintiff. A mere misrepresentation by the defendants of a fact not material to the plaintiff would not sustain the issue, and the only way in which the misrepresentation could be material to the plaintiff would be inasmuch as the defendants might be rendered the less able to carry into execution the fraudulent preference to himself by having bound themselves to act similarly by others. But he had no right to have that preference carried into execution, and therefore is not in law prejudiced by a failure in regard to it. The whole consideration for his release is the fraudulent preference promised to himself, and the withholding any such preference from other creditors. He cannot allege the former as a fraud on himself to vitiate the release, for he is *particeps fraudis*, and the latter is so entirely mixed up with it, deriving all its materiality from it, that the same disability seems to exist as to it."

The plaintiff is, therefore, in a position where he is not permitted to allege that the composition agreement is invalid, and he cannot, therefore, enforce his original notes. His only remedy against the defendants is upon the composition notes.

Hence it is quite clear that this complaint does not state a cause of action against the defendants, or any of them. The plaintiff, upon familiar principles, could not come into court and ask to have the agreement of Michael Kuntz, dated the twenty-eighth day of April, 1881, canceled. That agreement was fraudulent and void, and the parties thereto were *in pari delicto*, and the courts would not aid either of them to enforce or cancel it. Besides, that agreement does not bind him to anything, and if he desires to be rid of it he can tear it up, and he does not need the aid of any court. For reasons already stated, the court would not vacate the composition agreement, as that is binding upon the plaintiff. The court would not cancel the composition notes and authorize the plaintiff to surrender them to the defendants because they are valid. The court could not, for reasons already stated, give the plaintiff judgment upon the original notes, because they are released and discharged by the composition agreement. The court could not under this complaint, as it now stands, render judgment upon the composition notes, because, besides other obstacles, at the commencement of this action neither one of them was due.

The judgment should be affirmed, with costs.

Judgment affirmed.

COMPOSITION DEED BETWEEN DEBTOR AND HIS CREDITORS, whereby the latter agree with him and with one another to release him on the payment of a specified sum, which is less than the amount due them, is valid, and neither of them can subsequently maintain an action against him for a claim included in such deed: *Russell v. Rogers*, 25 Am. Dec. 574. But any private agreement by which one of the creditors shall receive a larger sum than the others is fraudulent and void: *Williams v. Schreiber*, 14 Hun, 40; *Kellogg v. Richards*, 14 Wend. 118; *Ramsdell v. Edgerton*, 41 Am. Dec. 503, and note.

HAYES v. NOURSE.

[107 NEW YORK, 577.]

RIGHT OF APPEAL IS NOT WAIVED by paying the judgment.

MOTION to dismiss an appeal as irregular and void, for the reason that the judgment from which said appeal purported to be taken was satisfied of record before the service of notice of appeal. The plaintiff recovered a judgment against the defendant in the court of common pleas on April 4, 1887, from which the defendant appealed to the general term of said

court, where the judgment was affirmed, and on June 10, 1887, a judgment of affirmance thereof, and for the costs of said appeal, was entered. On June 15th, the defendant voluntarily paid both of said judgments, applied to plaintiff's attorney for and received acknowledgments of satisfaction, and on the same day filed the same and caused said judgments to be satisfied of record. No process had been issued or proceeding taken to enforce payment of said judgments. On September 27, 1887, the defendant served notice of appeal to this court.

Arthur P. Hilton, for the motion.

Strong and Cadwalader, opposed.

By Court, DANFORTH, J. The defendant's practice in paying the judgment before appealing from it is not to be condemned. It is rather to be encouraged. A party who recovers at the trial term, and, against his adversary's appeal, sustains the recovery at the general term, might fairly be deemed entitled to the fruits of his action without further delay. The law, however, allows one more appeal, but although it is taken, the successful party may, nevertheless, enforce his judgment by execution, and so collect its award, unless the defeated party secures its ultimate payment by a deposit of money or an undertaking. Why may he not simplify the matter by placing the funds at once in the hands of the party, who, if the appeal fails, will be ultimately entitled to them? By so doing he will save the costs of execution, and do no harm to his creditor. We think he should not, by a temporary submission to the decision of the court, be placed in a worse position than if he awaited execution and settled it with sheriffs' fees. In *Dyett v. Pendleton*, 8 Cow. 326, an execution had in fact issued, but the court held that even a voluntary payment of the judgment would have been no reason against a writ of error; and in a subsequent case, *Clowes v. Dickenson*, 8 Cow. 328, Spencer, senator, referring to the decision just cited, says: "I feel confirmed, on reflection, that no matter how the money is paid or collected, this cannot affect the right to try error on appeal."

To the same effect are many subsequent decisions, and it must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such pay-

ment was by way of compromise, or with an agreement not to take or pursue an appeal: 1 Code Rep., N. S., 415, Court of Appeals, 1852; *Sheridan v. Mann*, 5 How. Pr. 201. The statute giving the right to appeal only requires that the judgment in question shall be final: Code, sec. 190; that the appeal shall be taken within one year after it is entered: Sec. 1325; and, anticipating such a case as that now presented, provides that if the judgment appealed is reversed, the appellate court may make or compel restitution. The same rule prevailed before the code, and it was applied whether the judgment was paid before or after a writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended: Tidd's Practice, 1033, 1034; *Sheridan v. Mann*, *supra*.

The appellant's practice has been regular, and the motion to dismiss the appeal should be denied, with ten dollars costs. Motion denied.

WAIVER OF RIGHT OF APPEAL. — The general rule upon the subject of the waiver of the right of appeal is in harmony with the principal case, and is to the effect that the payment of or other compliance with a judgment does not extinguish nor impair the right of appeal: *Clark v. Ostrander*, 13 Am. Dec. 546.

PEOPLE v. SQUIRE.

[107 NEW YORK, 598.]

CONSTITUTIONAL LAW — LOCAL LAW. — Statute relating to cities of more than five hundred thousand inhabitants is not a local or private law.

LAW IS NOT PRIVATE OR LOCAL LAW, although it may happen that the persons or companies whose operations are controlled by such law are few in number, and all doing business in one or more cities of the state.

CONSTITUTIONAL LAW. — STATUTE WHICH PROVIDES METHODS TO CARRY OUT and more conveniently or adequately enforce a prior statute, without inserting the latter statute as a part of its provisions, is not forbidden by section 17 of article 3 of the constitution of New York, declaring that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."

CONSTITUTIONAL LAW. — STATUTE DOES NOT IMPOSE TAX which requires of corporations the performance of certain duties, the expenses of which are to be paid in the first instance by the state, but are to be refunded by the corporation.

UNCONSTITUTIONAL PROVISION IN STATUTE WHICH MAY BE ELIMINATED without impairing the general scheme of the act vitiates so much of the statute only as may be declared unconstitutional.

STATUTE IS NOT UNCONSTITUTIONAL WHICH REQUIRES CORPORATIONS OWNING TELEGRAPH, TELEPHONE, ELECTRIC, or other wires or cables to remove them from the surface of the streets and place them under the ground, and in the event of their not doing so, empowering the city to make such removal at their expense; and which further provides that three commissioners shall be appointed to enforce the provisions of the statute by causing the removal of the wires and cables; and imposes on the companies the duty of filing with such commissioners a map, showing the streets or highways which the companies desire to use, and the general location, dimensions, and course of the underground conduits desired to be constructed, and forbids the construction of such conduits unless the plan of construction is approved by such commissioners. These statutory provisions do not impair pre-existing franchises, but merely regulate the mode of their enjoyment, to the end that due regard may be had to the rights of others, and in such a way that the wires and cables should cease to be a public nuisance, and be enjoyed in such a manner as to inconvenience and endanger the public as little as possible.

PRIMARY OBJECT OF PUBLIC STREETS AND HIGHWAYS is to furnish a passage-way for travelers in vehicles or on foot; and while they may be put to numerous other uses, such uses must be enjoyed in subordination to this primary object.

POWER TO CONTROL PUBLIC STREETS, AND TO PROVIDE FOR PROPER ADJUSTMENT of conflicting rights and interests therein, is a police power, the exercise of which may be delegated to municipal corporations.

POLICE POWER OF STATE EMBRACES its system of internal regulation by which it is sought to preserve the public order, and to prevent offenses against the state, and also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.

RIGHT TO EXERCISE POLICE POWER CANNOT BE ALIENATED, surrendered, or abridged by the legislature by any grant, contract, or delegation whatsoever. Hence no legislative grant can confer upon any corporation beyond the control of subsequent legislative action the power to tear up the streets of a city at such times, in such places, and under such circumstances as such corporation may determine, regardless of the public convenience and welfare and the rights of other claimants.

APPLICATION for a writ of mandate, brought in the name of the people of the state, on the relation of the New York Electric Lines Company, against Rollin M. Squire, commissioner of public works of the city of New York, to compel him to grant a permit to make excavations in the streets, for the purpose of laying wires. The writ was denied by the special term of the court of common pleas, and the order of denial was affirmed by the general term.

David Leventritt, for the appellant.

D. J. Dean, for the respondent.

By Court, RUGER, C. J. The relator was incorporated in 1882 for the purpose of "owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication, and for electric illumination, to be placed under the pavements of the streets," etc., in the counties of New York and Kings. Their organization was effected under chapter 265 of the laws of 1848, which, by a general law, authorized the formation of corporations of that character, and in 1883 it applied to and received from the common council of the city of New York, by virtue of the power conferred upon such council by chapter 397 of the laws of 1879, permission to construct conduits and lay wires in certain streets of New York, under certain conditions named in the ordinances, which, among other things, required that such work should be performed under the control and supervision of the commissioner of public works. The relator, in 1883, also filed with the clerk of New York County certain maps, plans, and tabular statements, as required by the ordinance, and proceeded to collect the material and equipments necessary to build its structures and transact its business. No further progress seems to have been made by the relator until July, 1886, when application was made by it, to the department of public works of New York, for permission to open some of the streets in the city, for the purpose of laying therein its wires and conductors. This permission was refused upon the ground that the relator had not obtained the approval of the subway commissioners of New York to its plans and construction.

This proceeding was brought to obtain a peremptory *mandamus* requiring the commissioner of public works to grant a permit to the relator, authorizing it to excavate in the streets of the city to enable it to construct conduits and lay electric wires and conductors therein. The application was denied at special term, and the general term, upon appeal to that court, affirmed the order denying the writ. Section 1 of chapter 534 of the laws of 1884, provides that "all telegraph, telephonic, and electric-light wires and cables used in any incorporated city of this state, having a population of five hundred thousand or over, shall hereafter be placed under the surface of the streets, lanes, and avenues of said city." Section 2 requires that "every corporation . . . owning or controlling telegraph, telephone, electric, or other wires or cables, . . . shall, before the first day of November, 1885, have the same

removed from the surface of all streets or avenues in every such city of this state"; and section 3 provides that in case the owners of such property do not comply with the provisions of the act within the time limited, the local governments of the said cities shall cause such wires, etc., to be removed and placed underground. These provisions do not seem to have been impaired in any material respect by the subsequent legislation of 1885 and 1886, and by express terms the act applies as well to existing companies as those thereafter to be formed.

By chapter 499, laws of 1885, it was provided that three persons should be appointed to constitute a board of commissioners of electrical subways in cities having a population exceeding five hundred thousand. By section 2 such boards were charged with the responsibility of enforcing the provisions of the act of 1884, and it was made their duty to cause to be removed from the surface of the streets, etc., all wires and cables used in the business of such electric companies, and to put them underground, wherever practicable, and cause them to be there operated and maintained, and said act of 1884 was declared to be amended to conform to the provisions of this act. Section 3 of said act provided that "when any company operating or intending to operate electrical conductors in any such city shall desire or be required to place its conductors or any of them underground, . . . it shall be obligatory upon such corporation to file with said board of commissioners a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimensions, and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed, it shall be necessary to obtain the approval of said board, of said plan of construction so proposed by such company." By section 10 "all acts and parts of acts inconsistent herewith are hereby repealed."

These acts seem to have been intended to apply to all companies, and to whatever stage of their organization they may have reached. It is not claimed by the relator that it has ever filed with the board of commissioners its maps and plans, as required by said act, or that it has obtained from them an approval of such maps, etc., and it is therefore clear that section 3 of the act of 1885 constitutes an insuperable objection to the relator's application, unless for some reason it be adjudged to be void for unconstitutionality.

The relator has met this question squarely, and challenges the constitutionality of the act upon several grounds, which may be summarized as follows: 1. That it violates section 16 of article 3, in that it is a local bill, and embraces more than one subject not expressed in its title; 2. That it violates section 17 of article 3, providing that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act"; 3. That said act levies a tax upon such companies, in that it is provided that the cost and expenses of such board of commissioners are authorized to be assessed by the comptroller of the state, when paid by him, upon the several companies operating electrical conductors in any such city of the state, which shall be required to place and operate its conductors underground; 4. That if said act of 1885 applied to the relator, it was unconstitutional, as it impaired the rights which it had secured by virtue of the grant, from the authorities of New York to construct conduits and lay wires and conductors in the streets of that city, and its acceptance thereof.

We are of the opinion that none of the points taken by the appellant are tenable. It is convenient to consider these questions in the order in which they have been stated.

1. The act referred to is not subject to the condemnation expressed in section 16, article 3, for the reason that it is neither a private or local bill, nor does it embrace more than one subject. The three acts of 1884, 1885, and 1886 all relate to the same subject; viz., that of placing all electrical wires and conductors, in cities exceeding five hundred thousand population, under the surface of streets, etc., subject to the control of the local authorities; and no provision is incorporated in either of these acts which is not strictly incidental to the general object intended to be accomplished. They relate simply to the mode and manner in which the provisions of the several acts in relation to the location and removal of electrical wires and conductors shall be applied and enforced, and constitute but one subject of legislation.

Neither is the act a local or private one, within the meaning of the section referred to. Such was the decision of this court in *In the Matter of New York Elevated R. R. Co.*, 70 N. Y. 327, and *In the Matter of Church*, 92 Id. 1. This act is general in its terms, applying to all cities in the state of a certain class,

and to every corporation carrying on a business requiring the use of electrical wires or conductors in such cities. That the number of such cities is limited or restricted does not make the bill a private or local one, within the constitutional meaning and intent of these words, was expressly decided in the cases referred to.

How many companies there are to which this bill applies we have no means of determining; but the fact that a general law is passed regulating the operations of all such companies, in cities of the class referred to, does not constitute it a private or local bill, although it may happen that such companies are all located in one or more cities of the state.

2. Neither do we think the act obnoxious to the objection that it incorporates in its provisions a prior act without inserting such act therein. The act is neither within the letter or spirit of the constitutional provision. There was no attempt to re-enact the law of 1884 by the law of 1885. The act of 1884 was a law by the force of its own enactment, and so continues. It has never been repealed or re-enacted. The act of 1885 treats that of 1884 as a valid and existing law, and purports simply to provide methods by which it may be more conveniently carried out and enforced. It might be better, perhaps, to have all laws relating to this subject incorporated in a single act; but I apprehend it is no objection to a law, under the constitution, that other laws on the same subject exist in other volumes of the statutes, or that the arrangement and location of such laws are faulty, or perhaps intricate and awkward, or involve labor and trouble to determine what in fact the law is. The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended. It must be presumed that the legislature is informed of the condition of a law which it is called upon to amend. It could never have been contemplated by the framers of the constitution that any legislator would remain ignorant of the provisions of a law which it was proposed to change, or

would require the provisions of such a law to be transcribed into the proposed legislation to enable him to act upon it judiciously and intelligently. Such a construction would lead to innumerable repetitions of laws in the statute books, and render them not only bulky and cumbersome, but confused and unintelligible almost beyond conception.

3. The claim that this law is void because it imposes a tax on the companies referred to cannot be maintained. The act of 1884 imposes the duty upon such companies to remove, and cause to be laid underground, all such wires and cables as are required in their business, and there is no reason why such companies should not be subjected to the payment of all expenses incurred in the construction of works required to carry on their own business.

This question has received a practical construction in the legislation of the state by its laws imposing upon banking and insurance corporations the expenses incurred by the government in the management and regulation of such institutions and their business operations. It has never been supposed that these laws imposed a tax, within the meaning of the constitution. A further answer to this point is found in the circumstance that, even if it be admitted that the law does impose a tax, it does not necessarily invalidate the other provisions of the statute. The comptroller of the state is required to pay these expenses in the first instance, and no question arises over the liability of the companies until they are called upon by the comptroller to refund to him the amount of such expenses. This provision of the statute may be eliminated from it without impairing in the least the general scheme of the act; and upon well-settled principles, when this can be done, it affects so much of the act only as may be declared unconstitutional.

4. The relator also claims that the act is obnoxious to the clause of the constitution which forbids the enactment of any law impairing the obligation of contracts. It may be said in reference to this claim that the contract itself provides that the work of removal and replacement, and of making excavations in the streets, avenues, etc., of the city by any telegraph company, for the purpose of laying its wires, shall be subject to the control and supervision of the commissioners of public works; and such commissioners might well require, in the exercise of their discretion, that the locality, time, mode, and manner of performing such work should be approved by the

officers having the general supervision of that subject in the city, before authorizing a single company, among the many claiming such privileges, to tear up its streets and construct trenches through its various thoroughfares and avenues at their own will and pleasure.

But we are of the opinion, for other reasons, that this legislation did not and was not intended to materially impair or restrict the enjoyment of the franchise secured by the relator. The necessity of these acts sprung out of a great evil, which in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation, not only of the surface and air above the streets, but indefinite space underground. This evil had become so great that every large city was covered with a network of cables and wires attached to poles, houses, buildings, and elevated structures, bringing danger, inconvenience, and annoyance to the public. Extensive spaces underground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to.

These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was, not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nui-

sance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.

That regulations of the character provided for in these acts are strictly police regulations, and such as no chartered rights can nullify or override, is too clear to admit of dispute. The primary and fundamental object of all public highways is to furnish a passage-way for travelers in vehicles or on foot, through the country: Bouvier's Institutes, sec. 442. They were originally designed for the use of travelers alone. But in the course of time and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. Thus they have been appropriated, in recent times, for the reception of sewers, water-pipes, gas-pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone, and other purposes, which all require in their construction the disruption of the pavements, and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities would seem imperatively to require the creation of a neutral board, with controlling authority, to form a comprehensive plan by which these various enterprises may be harmonized and carried on without detriment to each other and with due regard to the rights of the public. Such power is pre-eminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations.

An elementary writer has said that "the police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others": Cooley on Constitutional Limitations, 572.

Justice Shaw said, in *Commonwealth v. Alger*, 7 Cush. 84, that it was "a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it

under the implied liability that his use of it shall not be injurious to the rights of the community. All property in this commonwealth . . . is held subject to those general regulations which are necessary to the common good and general welfare."

Chief Justice Redfield, in *Thorpe v. Rutland and Burlington R. R. Co.*, 27 Vt. 149, 62 Am. Dec. 625, says: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state."

The right to exercise this power cannot be alienated, surrendered, or abridged by the legislature, by any grant, contract, or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights which it was especially designed to accomplish. Thus it was held in *Presbyterian Church v. City of New York*, 5 Cow. 540, where the corporation had granted, with a covenant for quiet enjoyment, a piece of land to the plaintiff to be used for church purposes and as a cemetery, that the power of the municipal government to pass an ordinance forbidding the use of such premises as a cemetery for the interment of the dead constituted no breach of the covenant. It was said that "the defendants are a corporation, and in that capacity are authorized by their charter and by-laws to purchase and hold, sell and convey, real estate in the same manner as individuals. . . . They are also clothed, as well by their charter as by subsequent statutes of the state, with legislative powers, and in the capacity of a local legislature are particularly charged with the care of the public morals and the public health within their jurisdiction. . . . They had no power as a party to make a contract which should control or embarrass their legislative powers and duties." To the same effect is *People v. Morris*, 13 Wend. 325.

In *Wynehamer v. People*, 13 N. Y. 421, Judge Comstock says, in speaking of rights of property: "The substantial right cannot be destroyed; its enjoyment is not an offense. . . . At the same time, the mode of enjoyment, in its broadest sense, is subject to legislation, though it be affected very injuriously, provided a substantial right is left. The claim made by the relator in this case would authorize it to tear up the streets of the city at such times, in such places, and under such circumstances as it might itself determine, regardless of the public convenience and welfare, and the rights of other

claimants to the occupation thereof, and place it beyond the reach of all power by the legislature to regulate the mode and manner of the enjoyment of its rights.

We do not think such a claim can be sustained. It is neither within the terms of its contract, and if it were, it is still subject, in the respects mentioned, to the police power of the state.

The order of the general term should be affirmed, with costs.

Order affirmed.

LOCAL AND PRIVATE LAWS. — A law is not necessarily a local law because "the practical effect and operation of the law is and must be in every instance local, special, and private." It is sufficient that the law offers like privileges to all who may comply with its terms or come within its provisions. In sustaining the constitutionality of a statute regarding elevated railways, the court of appeals of New York said: "The fact that some are not able to avail themselves of the opportunities offered does not impugn the general character of an act. When a railroad, under the general law, is constructed from one point to another, the topography of the country through which it runs may be such as to forbid the construction of another railroad. But one elevated railway can be constructed through the same street; and hence, upon any route in a city, but one company for the construction of a railway is practicable; and while the legislature could not by private act incorporate such company, the problem for it to solve by the general act was, how such railways could be constructed under a general act authorized by the constitution. It would not be feasible to permit the formation of several corporations to operate railways in the same streets, nor would it be wise to lease a railway to be constructed by the corporation which by accident was first in time. Nor would the same plan for the construction and operation of railways in all places be practicable. Hence it became the duty of the legislature, by a law having a general operation, to provide machinery which should determine the necessity of a railway, and the streets and places where it should be constructed, the company or organization of individuals which should construct it, and the plan upon which it should be constructed. While upon any route the franchises are given to one corporation, the formation of that corporation is open to all persons on the same terms, and no person is excluded from becoming a stockholder therein. The methods adopted in this act seem well devised to attain the end sought, and it is quite certain that, without some such methods, no elevated or underground railways can be constructed. And the act is not limited in time. While it is true that one set of commissioners can act upon but one application, a new set of commissioners can be appointed whenever any persons desire to form a corporation, and present the proper application. I can therefore entertain no doubt that this is a general act within the meaning of the constitution": *In the Matter of N. Y. Elevated R. R. Co.*, 70 N. Y. 346. In *In the Matter of Church*, 92 N. Y. 4, it was truly said, with respect to local and general laws: "It is not easy to define with accuracy the difference between the two forms of legislation, and the difficulty is better solved by adding examples to definitions. A law relating to particular persons or

things as a class is said to be general; while one relating to particular persons or things of a class is local and private." Referring to a statute applicable to counties having within their boundaries a city of more than one hundred thousand inhabitants, the court said: "The act of 1881 relates to a class, and applies to it as such, and not to the selected elements of which it is composed. The class consists of every county in the state having within its boundaries a city of one hundred thousand inhabitants and territory beyond the city limits mapped into streets and avenues. How many such counties there are now or may be in the future we do not know, and it is not material that we should. Whether many or few, the law operates upon them all alike, and reaches them, not by a separate selection of one or more, but through the general class of which they are general elements. The force of the general law of 1881 is not localized in Kings County and confined to its territory. By its terms it applies equally to every other county which may prove to be within the constituted class. It is said there is but one such county; and so also it is said there was but one elevated railroad. Neither fact at all narrowed the terms of the law. Those terms in each case were broad enough to cover every county in the state, if it had the required city and the mapped territory on the one hand, or its own elevated road on the other." These remarks were made with regard to a statute which, though in terms applicable to any county within the state, was in fact obviously intended to operate in a particular county only, and was unquestionably enacted in such terms as might obey the letter, while they violated and destroyed the spirit, of the constitutional inhibition against local legislation.

IRREPEALABLE LAWS. — Whenever a statute or a statutory grant partakes of the nature of a contract, any substantial modification thereof by the legislature is impossible as against persons whose rights would be injuriously affected because of the provisions of the constitution of the United States forbidding the enactment of any statute impairing the obligation of contracts. But unless controlled by this provision of the national constitution, or of the constitution of the state, a statute can never have the character of final or irrevocable legislative action. "Similar reasons to those which forbid the legislative department of the state from delegating its authority will also forbid its passing any irrepealable law. The constitution, in conferring the legislative authority, has prescribed to its exercise any limitations which the people saw fit to impose; and no other power than the people can superadd other limitations. To say that the legislature may pass irrepealable laws is to say that it may alter the very constitution from which it derives its authority; since, in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors; and the process might be repeated, until one by one the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be to a greater or less degree rendered ineffectual": Cooley's Const. Lim. 152.

POLICE POWER OF STATE is considered with respect to the constitutionality of laws inhibiting or regulating the manufacture and sale of certain articles which are supposed to injure or deceive the public, in the note to *Butler v. Chambers*, ante, p. 644-650, in *Commonwealth v. Kimball*, 35 Am. Dec. 326, and note 334, 335, and *Thorpe v. Rutland R. R. Co.*, 62 Am. Dec. 625, and note.

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2. AGENT WILL NOT BE PROTECTED AS AGAINST HIS PRINCIPAL who is seeking to foreclose a mortgage on land which such agent has purchased from an innocent holder of a deed therefor, when the claim to priority under such deed is based on the negligence of the agent in delaying the recording of such mortgage. *Id.*

3. **KNOWLEDGE OF FACT ACQUIRED BY AGENT AT TIME WHEN HE IS NOT ACTING AS SUCH**, if actually had in mind by him when afterwards acting for his principal, will, as respects that transaction, be imputed to the principal. *Wilson v. Minnesota etc. Ins. Ass'n*, 659.
 4. **WHERE WRITING IS ENTRUSTED TO ANOTHER, WITH BLANKS TO BE FILLED**, he has no authority to so fill them as to vary or pervert the scope or meaning of the words previously written or printed, nor to strike out any of the written or printed words, and replace them with others of a substantially different signification. *Harris v. Bank of Jacksonville*, 201.
- See CORPORATIONS; FACTORS; INSURANCE; HUSBAND AND WIFE.

ALIENS.

See JURY AND JURORS, 8.

ALTERATION OF INSTRUMENTS.

1. **BURDEN OF PROVING ALTERATIONS IN WRITING AFTER ITS EXECUTION** rests upon him who alleges it; but the burden shifts from him to his adversary, if the writing, on being produced, appears to have been altered in any substantial particular. *Harris v. Bank of Jacksonville*, 201.
2. **APPARENT AND MATERIAL ALTERATION IN WRITING MUST BE EXPLAINED** by the party who offers it in evidence. *Id.*
3. **THERE IS NO APPARENT ALTERATION OF PAPER** where there is no interlineation, erasure, difference in handwriting, change of figures or words, nor any irregularity on the face of the paper calculated to arouse suspicion. An alteration of a bill is not presumed because the words, "Payable at Metropolitan Nat. Bank, New York City," are written across the bill in the handwriting of the drawer, and above the acceptance. *Id.*
4. **EVIDENCE.** — The death of one of the parties to a receipt, acceptance, or other writing, precludes the survivor from testifying against the assignee or representative of the decedent, with respect to an alleged alteration thereof, although the decedent acted on behalf of a partnership, provided his copartners were not present at the time the writing was executed, and therefore can give no evidence with respect thereto. *Id.*

See AGENCY, 4.

ANIMALS.

See COMMON CARRIERS, 4, 7-10.

APPEALS.

See PLEADING AND PRACTICE.

ARBITRATION AND AWARD.

CLAIM WHICH IS ILLEGAL AND ABSOLUTELY FORBIDDEN BY STATUTE cannot lawfully be made the subject of arbitration. *Hall v. Kinsner*, 575.

ARREST.

IN MICHIGAN, NO ARREST CAN BE MADE FOR MISDEMEANOR, UNLESS BY WARRANT, upon complaint duly made, or by an officer or by-stander who actually sees the offense which constitutes the misdemeanor. *Ross v. Leggett*, 608.

See FALSE IMPRISONMENT.

ASSIGNMENTS.

See LANDLORD AND TENANT, 9, 10.

ATTACHMENTS.

1. **ATTACHMENT UNDER WRIT AGAINST VENDOR** of property in possession of vendee, under contract of purchase, is neither a lien on the property nor on the unpaid purchase-money. *Burke v. Johnson*, 252.
2. **ATTACHMENT LIEN** is not greater than that created by a judgment. *Id.*
3. **PLAINTIFF LEVYING ATTACHMENT IS NOT PURCHASER**, and is therefore affected by prior transfers of which he has no notice. *Id.*
4. **RETURN ON ATTACHMENT IS SUFFICIENT** as against a collateral attack, when it states that the officer "duly levied upon all the right, title, and interest of the defendant in and to the following real property, to wit" (describing the land in controversy). *Anderson v. Goff*, 34.
5. **AFTER ATTACHMENT OF PROPERTY, NO ORDER OF SALE** is necessary to authorize the sale thereof, the lien of the attachment continues after taking a simple money judgment, without embodying therein any directions for the sale of the attached property. *Id.*
6. **JUDGMENT DEBTOR MAY BE GARNISHED** by delivering to him a copy of the writ of execution, with a notice in writing stating that all his right, title, and interest in such judgment, and all moneys, goods, credits, and effects due or owing by him to the judgment creditor are levied upon. *Dore v. Dougherty*, 48.

ATTORNEY AND CLIENT.

1. **ATTORNEY AT LAW IS FORBIDDEN** to purchase an interest in the thing in controversy adverse to his client. *Cunningham v. Jones*, 257.
2. **PURCHASE BY ATTORNEY** is not voidable merely, but void absolutely when it is of an interest in property adverse to a client for whom he is then acting. *Id.*
3. **TAX DEED MADE TO ATTORNEY AT LAW IS VOID**, if the owner of the land was the client of such attorney at the time. *Id.*
4. **PRIVILEGED COMMUNICATION MUST BE MADE FOR PURPOSE OF OBTAINING LEGAL ADVICE** upon the client's business or interests. A conversation between two persons in the presence of an attorney, employed by them to prepare a paper in connection with the subject of the conversation, is not privileged, and the testimony of the attorney concerning the conversation is competent. *House v. House*, 570.

See PROCESS, 4.

BANKS AND BANKING.

1. **BANK IS NOT LIABLE TO PAY CHECK DRAWN THEREON** by a depositor, except by its acceptance thereof in writing. *Lynch v. First Natinal Bank*, 803.
2. **BANK ACCEPTS CHECK DRAWN THEREON**, when it indorses upon it a certificate of genuineness, and directs its payment at another bank. Such indorsement is equivalent to a representation that the drawer has funds in the bank with which to pay the check, and that the bank will retain such funds and pay the check at the bank designated. *Id.*
3. **RELATION BETWEEN BANK AND DEPOSITOR** is that of debtor and creditor, and the bank holds the fund subject to be paid out to the creditor, according to the terms and conditions imposed by him. *Id.*

4. CHECK DRAWN BY DEPOSITOR, PAYABLE TO HIMSELF OR ORDER and accepted by the bank, does not impose on it any obligation to pay the check to one to whom the drawer delivered the check without indorsement, in payment of a purchase made by him. *Id.*

BILLS OF LADING.

See COMMON CARRIERS.

BONA FIDE PURCHASERS.

1. PURCHASER IS CHARGED WITH NOTICE that his grantor held title by what equity must declare to be an invalid deed, when such grantor was out of and had never been in possession, and others had controlled the property in many ways for many years, and when an examination of the registry of deeds would have shown conveyances inconsistent with the full validity of the deed under which the grantor claimed, and when the purchase was for a grossly inadequate price. *Knapp v. Bailey*, 295.
2. FACT THAT PURCHASER ACCEPTS QUITCLAIM DEED is a circumstance entitled to consideration in determining whether he is a *bona fide* purchaser without notice. *Id.*
3. NOTICE OF TRUST. — Provision of the Revised Statutes of Maine, declaring that a purchaser for a valuable consideration cannot be defeated by a trust of which he has no notice, means actual notice. *Id.*

See DEEDS.

BONDS.

See CORPORATIONS, 8; REPLEVIN, 5.

BOUNDARIES.

See DEEDS, 4.

BRIBERY.

See CRIMINAL LAW, 11.

CHECKS.

See BANKS AND BANKING.

COMITY.

See CORPORATIONS.

COMMON CARRIERS.

1. PETITION IN ACTION AGAINST COMMON CARRIER alleging the delivery and loss of the property through negligence in managing and operating the train is sufficient. *McFadden v. Missouri Pacific Ry Co.*, 721.
2. COMMON CARRIER CANNOT BY ANY SORT OF STIPULATION exempt himself from the consequences of his negligence, though he may, by special or express contract, or special acceptance, fairly and understandingly made, limit his common-law liability. *Id.*
3. WHERE MULES ARE DELIVERED TO COMMON CARRIER, and the car in which they are transported is bedded with straw, and placed next to the engine, which placing of the mules is unusual, dangerous, and negligent, and the car is set on fire from sparks emitted by the engine, and the

- mules thereby destroyed, a stipulation in the bill of lading that the carrier is not liable for "the risk of loss or injury to the mules by fire, or any account whatever," is so far invalid, and no protection to him. *Id.*
4. ALL PRIOR VERBAL NEGOTIATIONS BETWEEN SHIPPER and common carrier are merged in the bill of lading or contract of shipment, and the shipper cannot admit the execution of the contract, and avail himself of the fact that he did not read the same, or know its contents, where no mistake, fraud, imposition, or deceit is charged. *Id.*
 5. BILL OF LADING, OR CONTRACT OF SHIPMENT, stipulating for a reduced or special rate of freight, is not conclusive, but only *prima facie* evidence, open to explanation and contradiction. *Id.*
 6. WHERE BILL OF LADING FALSELY RECITES that a special and reduced rate of freight is given, and the shipper, in consideration therefor, agrees to accept a limited valuation for the property transported, in case of its loss through the negligence of the carrier, the contract is not binding on the shipper, and the stipulation as to limited valuation is void, as releasing the carrier for his liability for negligence. *Id.*
 7. PERSON TRANSPORTING LIVE-STOCK ASSUMES WITH RESPECT TO IT COMMON-LAW RELATION of a common carrier with the incident duties and obligations, subject, however, to the modification that he is not an insurer, as respects injuries resulting without his fault from the inherent nature and propensities of the animals themselves. *Lindsley v. Chicago etc. R'y Co.*, 692.
 8. BURDEN OF PROOF THAT CAUSE OF DEATH OF LIVE-STOCK IN COURSE OF TRANSPORTATION was within the exception qualifying his general liability is upon the carrier. *Id.*
 9. INSTRUCTION TO JURY THAT DEFENDANT MUST PROVE TO THEIR SATISFACTION, by a preponderance of the evidence, that death of live-stock in course of transportation resulted from some other cause than the defendant's negligence, means no more than that the defendant should establish that fact by what the jury should deem to be the weight of evidence. And there is no error in the form or terms of such instruction. *Id.*
 10. EXPERT WITNESS MAY BE ASKED WHAT COURSE CARRIER MIGHT PROPERLY PURSUE FOR RELIEF OF LIVE-STOCK suffering greatly from heat, while in transit in a railroad car. *Id.*
 11. ANY NOTICE BY CONSIGNOR TO CARRIER to stop the goods in transit is sufficient; no particular form of notice is required. *Allen v. Maine Central R. R. Co.*, 310.
 12. CONSIGNOR EXERCISING RIGHT OF STOPPAGE IN TRANSITU must act in good faith toward the carrier, but if after giving notice to stop the goods, and furnishing reasonable evidence of the validity of his claim in due time by forwarding the invoice and his affidavit of ownership, the carrier refuses to stop the goods, he must respond in damages. *Id.*
 13. PASSENGER RIDING ON FREIGHT TRAIN, by direction and permission of the conductor, and without notice that his so riding is against the rules of the company, is entitled to the same rights as if he were riding on a passenger train. *McGee v. Missouri Pacific R'y Co.*, 706.
 14. IF PASSENGERS ARE HABITUALLY CARRIED ON RAILWAY COMPANY'S FREIGHT TRAINS, one who is received as a passenger on such train is entitled to the same degree of care as passengers on regular trains, except that in taking the freight train, accepting and traveling upon it, he acquiesces in the usual incidents and conduct of such train, managed by prudent and competent men. *Id.*

15. **WHEN IN ACTION AGAINST RAILROAD COMPANY** for injuries received by one in alighting from a freight train, on which he was regularly received and traveling as a passenger, it appears that the train was not stopped at the usual place, where it was safe for passengers to alight, but at an unusual place, where it was unsafe and dangerous, and where the regular station was announced, thereby inviting the party injured, nothing to the contrary appearing, to get off when and where it stopped, and the night was very dark, and passengers in the caboose could not, for that reason, see the danger, and the conductor, on leaving the caboose with the light, could or might have seen it, his failure to warn and inform the passengers of the danger was gross negligence, for which the company is liable. *Id.*
16. **SLOWING UP OF FREIGHT TRAIN** carrying passengers, as it approached a regular station, the sounding of the whistle, the announcement by the brakeman of the station, stopping the train, the act of the conductor and brakeman leaving the caboose with the light, and the detachment of the engine to take water, can be construed only as a direction to the passengers to alight, then and there, and they, in absence of proof to the contrary, have the right to conclude that it is a safe place to alight, and if one receives injury in so doing, because the place is dangerous, the company is liable. *Id.*
17. **IN ACTION AGAINST RAILROAD COMPANY** for injury received while traveling as a passenger on a freight train, evidence is admissible to prove that it was the custom and usage of the company to carry passengers on their freight trains. *Id.*
18. **EVIDENCE IS ADMISSIBLE TO PROVE** that the station announced is the stopping-place for freight trains, in an action against a railroad company for injury received while traveling as a passenger on such train. *Id.*

COMPOSITION.

See ACCORD AND SATISFACTION.

CONFLICT OF LAWS.

See EXECUTORS AND ADMINISTRATORS.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL PROVISION REQUIRING AMENDMENTS TO CONSTITUTION TO BE ENTERED** on the journals of the senate and assembly is satisfied by the entry on such journals of an identifying reference. The amendment need not be copied in full upon such journal. *Oakland Paving Co. v. Tompkins*, 17.
2. **TO ENTER PRIMARILY MEANS TO GO IN OR TO COME IN.** It also sometimes means to register the essential fact concerning the thing said to be entered. *Id.*
3. **WORDS USED IN CONSTITUTION WILL BE ACCORDED** their popular rather than their technical signification, unless the nature of the subject, or the text, suggests their use in their technical sense. They must be taken in their ordinary and common acceptation, because they are presumed to have been so understood by their framers and by the people. *Miller v. Dunn*, 67.
4. **WORD "LAW," AS USED IN CONSTITUTION,** generally signifies a statute, bill, or legislative enactment, regardless of its constitutionality or validity. *Id.*

5. **STATUTES WILL NOT BE ADJUDGED UNCONSTITUTIONAL**, if there is a fair doubt as to their validity. *Id.*
6. **UNCONSTITUTIONAL LAW IS NOT VOID AB INITIO IN ALL CASES**. It will protect citizens dealing with public officers under its provisions until it is adjudged unconstitutional. *Id.*
7. **CONSTITUTIONAL LAW**. — Legislature may authorize payment of a claim created under and by virtue of an unconstitutional law, though it is declared by the constitution to have no power to authorize the payment of any claim created without express authority of law. *Id.*
8. **CONSTITUTIONAL LAW — LOCAL LAW**. — Statute relating to cities of more than five hundred thousand inhabitants is not a local or private law. *People v. Squire*, 893.
9. **LAW IS NOT PRIVATE OR LOCAL LAW**, although it may happen that the persons or companies whose operations are controlled by such law are few in number, and all doing business in one or more cities of the state. *Id.*
10. **CONSTITUTIONAL LAW**. — **STATUTE WHICH PROVIDES METHODS TO CARRY OUT** and more conveniently or adequately enforce a prior statute, without inserting the latter statute as a part of its provisions, is not forbidden by section 17 of article 3 of the constitution of New York, declaring that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." *Id.*
11. **CONSTITUTIONAL LAW**. — **STATUTE DOES NOT IMPOSE TAX** which requires of corporations the performance of certain duties, the expenses of which are to be paid in the first instance by the state, but are to be refunded by the corporation. *Id.*
12. **UNCONSTITUTIONAL PROVISION IN STATUTE WHICH MAY BE ELIMINATED** without impairing the general scheme of the act vitiates so much of the statute only as may be declared unconstitutional. *Id.*
13. **STATUTE IS NOT UNCONSTITUTIONAL WHICH REQUIRES CORPORATIONS OWNING TELEGRAPH, TELEPHONE, ELECTRIC, or other wires or cables to remove them from the surface of the streets and place them under the ground, and in the event of their not doing so, empowering the city to make such removal at their expense; and which further provides that three commissioners shall be appointed to enforce the provisions of the statute by causing the removal of the wires and cables; and imposes on the companies the duty of filing with such commissioners a map, showing the streets or highways which the companies desire to use, and the general location, dimensions, and course of the underground conduits desired to be constructed, and forbids the construction of such conduits unless the plan of construction is approved by such commissioners. These statutory provisions do not impair pre-existing franchises, but merely regulate the mode of their enjoyment, to the end that due regard may be had to the rights of others, and in such a way that the wires and cables should cease to be a public nuisance, and be enjoyed in such a manner as to inconvenience and endanger the public as little as possible.** *Id.*
14. **POLICE POWER OF STATE EMBRACES** its system of internal regulation by which it is sought to preserve the public order, and to prevent offenses against the state, and also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the unia-

interrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others. *Id.*

15. **RIGHT TO EXERCISE POLICE POWER CANNOT BE ALIENATED**, surrendered, or abridged by the legislature by any grant, contract, or delegation whatsoever. Hence no legislative grant can confer upon any corporation beyond the control of subsequent legislative action the power to tear up the streets of a city at such times, in such places, and under such circumstances as such corporation may determine, regardless of the public convenience and welfare and the rights of other claimants. *Id.*
16. **STATUTE INTENDED TO RESTRAIN OR SUPPRESS MANUFACTURE AND SALE OF OLEOMARGARINE**, and like compounds resembling and intended as a substitute for butter, is valid, as a legitimate exercise of the police power of the state. Such legislation is justified upon the ground that the use of the inhibited compounds is injurious to the public health. *Butler v. Chambers*, 638.
17. **PROVISIONS OF SECTION 4 OF CHAPTER 149, LAWS OF 1885, ARE LEGITIMATELY CONNECTED WITH SUBJECT** of the act, and included therein, and therefore the act is not repugnant to article 4, section 27, of the constitution of Minnesota. *Id.*
18. **STATE SENATE HAS POWER TO INQUIRE INTO ALLEGED ABUSES OF PUBLIC POWER** and the corruption of public officers, and to delegate the duty of making such inquiry to one of its committees. Such committee may compel the attendance of witnesses, and on their refusal to answer may commit them for contempt. *People v. Sharp*, 851.

CONTEMPT.

See CONSTITUTIONAL LAW, 16.

CONTRACTS.

1. **IN ALL CASES CONTRACT SHOULD BE SO CONSTRUED AS TO CARRY INTO EFFECT** the intention of the parties, and such intent must be ascertained from the language of the instrument, and the facts and circumstances attending its execution. *Mathews v. Phelps*, 581.
2. **RULE THAT PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT OR VARY WRITTEN CONTRACT** applies only to a written contract which is in force as a binding obligation. *McFarland v. Sikes*, 111.
3. **WRITTEN CONTRACT MAY BE DELIVERED UPON CONDITION**, but it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. *Id.*
4. **TO RENDER EXECUTORY CONTRACT VALID, BOTH PARTIES THERETO MUST BE BOUND** by it, and no action to recover damages for the non-performance of a contract which is not binding upon both parties can be maintained. Where, therefore, an instrument in writing under seal, purporting to be a lease, provides that it shall not be binding on the lessee in any way until he shall be appointed and installed by the proper officers of a certain railroad company as freight and ticket agent of said company at a particular station, such lessee cannot maintain an action for damages for the non-performance of the contract until he has been so appointed and installed, although he elects that the lease shall be binding upon him, and demands possession of the premises demised. *King v. Warfield*, 384.

5. CONTRACT ENTERED INTO BY PARTY WHO IS SO DRUNK AS NOT TO KNOW WHAT HE IS DOING IS VOIDABLE ONLY, and not void, and may be ratified by such party when he becomes sober. *Carpenter v. Rodgers*, 595.
6. BURDEN OF PROOF RESTS UPON ONE CLAIMING TO BE SPIRITUALISTIC MEDIUM, to show that a contract made by him with one having implicit belief in the existence of the powers claimed by such medium was free from undue influence. *Connor v. Stanley*, 84.
7. RELATION OF PECULIAR TRUST AND CONFIDENCE EXISTS BETWEEN ASSUMED SPIRITUALISTIC MEDIUM and a believer in his alleged powers, which raises the presumption that an advantage obtained by the former over the latter resulted from undue influence. *Id.*
8. CONTRACT IN RESTRAINT OF TRADE IS VALID, if it imposes no restriction upon one party not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it. *Hodge v. Sloan*, 816.
9. RELATION OF DEBTOR AND CREDITOR MUST BE CREATED AND SUBSIST IN LIFETIME of the parties to an instrument in order to make it a valid obligation for the payment of money, though the time of payment may be deferred until after the death of one of the parties. *Cover v. Stem*, 406.
10. INSTRUMENT IN FOLLOWING FORM IS TESTAMENTARY IN CHARACTER, and not an obligation for the payment of money, and no recovery thereon can be had against the executor: "Md., September 4, 1884. At my death, my estate or my executor pay to July Ann Cover the sum of three thousand dollars. David Engel, of P. [Seal] Witness: Columbus Cover,"—although it was delivered to the person to whom payment was directed to be made. And its construction cannot be affected by the fact that it must fail of effect as a testamentary paper, because of insufficient witnesses under the statute. *Id.*

See CORPORATIONS; GAMING; INFANCY; STATUTE OF FRAUDS.

CORPORATIONS.

1. CORPORATION, WHEN ACTING WITHIN SCOPE OF ITS AUTHORITY, has all the powers of ordinary persons, and when so acting, its contracts, whether sealed or unsealed, written or unwritten, are valid. *Deringer v. Deringer*, 150.
2. DEBTS ACCEPTED BY TREASURER OF CORPORATION ARE PRESUMED TO BE PROPERLY ACCEPTED by the corporation, there being no circumstances to indicate fraud or illegality; and in an action by the holder against the corporation as acceptor, the burden of proof is upon the defendant corporation to show that the plaintiff had knowledge that the acceptances were for accommodation, and that he was not a *bona fide* holder for value. *Credit Company, Limited, v. Howe Machine Co.*, 123.
3. CORPORATION HAVING POWER TO DEAL IN MERCANTILE PAPER NECESSARY TO ITS BUSINESS IS BOUND by acceptances of accommodation paper by its treasurer, except as against those having notice that the paper was for accommodation. *Id.*
4. PERSONS DEALING IN COMMERCIAL PAPER OF CORPORATION ARE BOUND TO TAKE NOTICE of the extent of its power, but are not required to have knowledge of the circumstances under which it is exercised. And especially is this so where the agent or officer of the corporation which exercises the power, at the same time represents the corporation, and speaks for it in giving information as to the circumstances. *Id.*

5. **PERSON DEALING WITH CORPORATION IS BOUND TO KNOW WHETHER OR NOT** the officer or agent who represents it, and acts in its name, is authorized so to do. If he is, and the act is within the apparent scope of his authority, the dealer is not bound to have knowledge of extrinsic facts making it improper for him to act in that case. *Id.*
6. **CORPORATION MAY BE TRUSTEE BOTH OF REAL AND PERSONAL PROPERTY**, and its authority as such is the same as that of an individual so acting. *Deringer v. Deringer*, 150.
7. **CORPORATION, UNLESS PROHIBITED BY ITS CHARTER or by statute**, has power to make all contracts requisite for the purposes for which it was created. *Id.*
8. **FOREIGN CORPORATION HAS FULL POWER TO EXECUTE BOND**, and when this is done, it has complied with the law of this state as to the qualification of a foreign administrator. *Id.*
9. **BY-LAW OF CORPORATION MUST BE REGARDED AS CONTRACT** between the corporation and its stockholders, when it states the conditions on which dividends are to be paid, as between preferred and unpreferred stock. *Hazeltine v. Belfast etc. R. R. Co.*, 330.
10. **IN DECLARING DIVIDENDS ON PREFERRED STOCK**, the arrearages of one year cannot be paid out of the earnings of a subsequent year, when the by-law of the corporation upon the subject implies that the entire net earnings of each year shall be paid out in dividends. *Id.*
11. **PROFITS GENERALLY MEAN** the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account. *Id.*
12. **PROFITS FOR YEAR MEAN** the surplus receipts after paying expenses, and restoring the capital to the position it was in on the first day of the year. *Id.*
13. **NET EARNINGS OF RAILROAD ARE GROSS RECEIPTS** less the expenses of operating the road to earn such receipts. Among these expenses is included interest on debts. *Id.*
14. **RIGHTS OF PREFERRED STOCKHOLDERS ARE ENFORCEABLE** against the corporation according to the terms of the contract made by them. *Id.*
15. **DIVIDENDS MAY BE PAID**, although the corporation is not free from floating debt. *Id.*
16. **PREFERRED STOCKHOLDERS ARE ENTITLED TO DIVIDENDS** from earnings on hand, without first making provision for the payment of the principal of the bonded debt, where the corporation is in good circumstances and credit, and could doubtless provide for an extension of the time for paying such debt, or make payment by the issue of other bonds. *Id.*
17. **EQUITY WILL COMPEL DIRECTORS OF CORPORATION TO DECLARE DIVIDEND** in favor of holders of preferred stock, who are shown to be entitled thereto. *Id.*
18. **ONE DOES NOT BECOME LIABLE AS STOCKHOLDER IN CORPORATION** by the issuing to him by the corporation of stock, when the entry in the stock-book, and all the other records of the corporation, show that such stock was issued as collateral security. To make one answerable as a stockholder to creditors of a corporation, he must be a stockholder as between himself and the corporation. *Union Savings Association v. Seligman*, 776.
19. **ESTOPPEL.** — Voting as a stockholder at an election will not estop the person voting from showing, in an action against him by the creditors of the corporation, that he was not a stockholder therein. *Id.*

20. ACT OF VOTING STOCK DOES NOT MAKE VOTERS ABSOLUTE STOCKHOLDERS, either as between themselves and the corporation, or creditors of the corporation. They are still entitled to show that they held such stock as collateral security, and not otherwise. *Id.*
 21. COMITY OF ONE STATE WILL ENFORCE LAWS OF ANOTHER STATE, when such enforcement neither violates its own laws nor infringes the rights of its own citizens; and on like terms it will permit a corporation of another state to transact business within the state into which it comes. *Deringer v. Deringer*, 150.
 22. RIGHT OF FOREIGN CORPORATION TO DO BUSINESS within this state cannot be called in question except by the state itself. *Id.*
 23. IT IS NOT NECESSARY UNDER MICHIGAN STATUTE (HOW. STAT., SEC. 8145) THAT OFFICER OR AGENT OF FOREIGN CORPORATION, upon whom service is made while in the state, should be in the state upon official business for his corporation, or be specially authorized by it to receive service of process. He must be presumed and held to be such officer for the purposes of the statute, and he cannot throw off his representative capacity at will, in order to defeat its manifest object. *Shickle etc. Iron Co. v. Construction Co.*, 571.
 24. INSURANCE COMPANY, INCORPORATED IN ONE STATE, WAIVES ANY OBJECTION TO EXERCISE OF JURISDICTION BY COURTS OF ANOTHER STATE, by appearing generally and answering to the merits, in a suit in equity against it, brought by a resident of the former state, who had there taken out a policy on the tontine savings fund assurance plan, to obtain an account of the surplus or profits derived from such policies as should cease to be in force before the completion of their respective tontine periods, which were to be apportioned equitably among such policies as should complete such periods. *Pierce v. Equitable Life Ins. Society*, 433.
- See EXECUTORS AND ADMINISTRATORS; INSURANCE; MANDAMUS; MUNICIPAL CORPORATIONS.

COSTS.

1. COSTS IN CRIMINAL ACTIONS ARE UNKNOWN at common law, and are only given by statute. *Bennett v. Kroth*, 248.
2. COSTS ARE STATUTORY ALLOWANCE to a party to an action for his expenses incurred in such action, and have reference only to the parties and the amounts paid by them. *Id.*

CO-TENANCY.

1. TENANT IN COMMON MAY MAINTAIN ACTION OF INDEBITATUS ASSUMPSIT against his co-tenant who has received more than his share of the rents and profits, and this, independently of section 20, chapter 95, of the Revised Statutes of Maine. *Hudson v. Coe*, 288.
2. DISPUTE IN TITLE WILL NOT PREVENT TENANT IN COMMON from maintaining an action of *indebitatus assumpsit* against his co-tenant for receiving more than his share of the rents and profits, if the plaintiff was not disseised of his estate at the date when such rents and profits were received. *Id.*
3. IN ACTION OF INDEBITATUS ASSUMPSIT by one tenant in common against another, the plaintiff cannot recover any rents and profits received by defendant before plaintiff's title accrued. *Id.*
4. ONE CO-TENANT DOES NOT DISSEISE ANOTHER by entering upon the land under a tax deed, and exercising such acts of ownership as tracing and

running lines, paying taxes, and permitting wild grass, and occasionally timber, to be cut from year to year on various portions thereof. *Id.*

5. ENTRY OF ONE CO-TENANT IS ENTRY OF ALL. *Id.*
6. POSSESSION OF ONE CO-TENANT IS ALWAYS PRESUMED to be in accordance with a common title until some notorious and unequivocal act of exclusion occurs. *Id.*
7. ONE TENANT IN COMMON OF PERSONAL PROPERTY MAY SEPARATELY MAINTAIN ACTION for a wrong done to it, if his co-tenants refuse to join with him as plaintiffs, and they are non-residents of and are without the state. *Peck v. McLean*, 665.

COUNTERCLAIM.

1. COUNTERCLAIM IS DEMAND OF SOMETHING WHICH OF RIGHT BELONGS TO DEFENDANT, in opposition to the right of the plaintiff. It may also be defined as a claim which, if established, will defeat or qualify a judgment to which plaintiff would otherwise be entitled. *Venable v. Dutch*, 260.
2. COUNTERCLAIM IN EJECTMENT. — An answer by defendant in ejectment setting up a tax title, and also a judgment in his favor against plaintiff quieting his title, is a counterclaim. *Id.*
3. BURDEN OF PROVING FACTS STATED IN HIS COUNTERCLAIM rests upon the defendant. *Id.*

COVENANTS.

1. COVENANT BY OWNER OF LAND TO USE OR TO ABSTAIN FROM USING IT, in such a manner as the other party to the contract specifies, will be enforced in equity against the grantees of the original covenantor. *Hodge v. Sloan*, 816.
2. AGREEMENT BETWEEN GRANTOR AND GRANTEE, THAT LATTER WILL NOT SELL ANY SAND OFF OF PREMISES conveyed to him by the former, will be enforced in equity against the grantee and his successors in interest, where it appears that the grantor exacted such agreement as a condition precedent to the sale, he being engaged in the business of selling sand from a tract of land of which the premises conveyed constituted but a small part. *Id.*
3. RIGHT TO SUE FOR BREACH OF COVENANT TO SURRENDER POSSESSION IS NOT WAIVED by a subsequent action of ejectment for the demised premises, in which the recovery of damages is not sought. *Coburn v. Goodall*, 75.
4. IN DETERMINING AMOUNT OF DAMAGES SUSTAINED BY FAILURE TO SURRENDER LEASED PREMISES to the lessor, the amount of profits derived by the defendants from a wharf and chute adjacent thereto is a proper subject of inquiry, providing it is not taken as the measure of damages. It is proper to put the court in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the quantum of damages can be deduced. *Id.*

See DEEDS, 9.

CRIMINAL LAW.

1. CONFESSIONS ARE PRESUMED TO HAVE BEEN VOLUNTARILY MADE, in the absence of all evidence; and when the accused alleges the contrary, he is called upon to at least rebut such presumption. *People v. Barker*, 501.

2. **EVIDENCE OF CONFESSIONS IS PROPERLY ADMITTED**, where there was nothing at the time of their admission to show that they were not voluntary; although it subsequently appeared that a prior confession had been obtained from the accused by such artifice and deception as rendered evidence thereof incompetent; but had the facts relating to the prior confession been shown before the subsequent confessions were offered, it would have been incumbent upon the prosecution to prove that the latter were not the result of illegal influence. *Id.*
3. **QUESTION WHETHER SUBSEQUENT CONFESSION WAS RESULT OF SAME INFLUENCE WHICH INDUCED PREVIOUS CONFESSION** is one for the jury, under proper instructions from the court, where a subsequent confession is claimed to have been subject to the influence of an inducement held out or exercised to obtain a previous confession. *Id.*
4. **IT IS PROVINCE OF COURT TO DETERMINE WHETHER CONFESSION WAS VOLUNTARY OR NOT**, in a case free from doubt, before admitting or rejecting the same as evidence; but if there is a conflict of testimony, or room for doubt, the court should submit the question to the jury, with instructions that if they were satisfied that there were inducements, they should disregard the confession. *Id.*
5. **NOTES AND LETTERS CONCERNING CRIME ARE ADMISSIBLE IN EVIDENCE WITHOUT FORMAL PROOF OF HANDWRITING**, where a witness identifies them, and testifies that they were handed to him by one of the accused to be delivered to the other, but that he gave them to the sheriff or to his wife. *Id.*
6. **EVIDENCE OF ABSENCE OR FLIGHT OF PERSONS** wanted as witnesses against a person being prosecuted for crime is not admissible on behalf of the prosecution, where the evidence already received tended to show that such absent persons were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue, and were seemingly connected with the defendant in the act charged. *People v. Sharp*, 851.
7. **EVIDENCE OF COMMISSION OF CRIME OTHER THAN ONE CHARGED.**—The cases on this subject stated and analyzed by Peckham, J. *Id.*
8. **TERM "ACCOMPLICE" INCLUDES ALL PERSONS** concerned in the commission of an offense, irrespective of the grade of their guilt. *People v. Kraker*, 65.
9. **UNCORROBORATED EVIDENCE OF THIEF** will not justify the conviction of one indicted for receiving stolen goods, knowing them to have been stolen. *Id.*
10. **WHETHER WITNESS IS ACCOMPLICE** is a question of fact for the jury. *Id.*
11. **EVIDENCE.**—An attempt to bribe one person should not be allowed to be proved on a prosecution for bribing another person at a different time. *People v. Sharp*, 851.
12. **EVIDENCE OF DISPOSITION TO COMMIT CRIME** ought not to be admitted against the defendant in a criminal case. *Id.*
13. **EVIDENCE OF PRIOR CRIME** can have no legitimate place in an investigation as to whether a subsequent crime was committed by the same person. *Id.*
14. **COMPOUNDING FELONY.**—In all cases where parties have suffered injury from the commission of a felony, they may compromise or settle their private damages in any way they see fit, provided they do not include in such settlement the stifling of the criminal prosecution for such felony. *Johnston v. Allen*, 180.

15. **OPINIONS OF MEDICAL EXPERTS HELD ADMISSIBLE**, under the circumstances, in a criminal prosecution for murder, as to how death occurred. *People v. Barker*, 501.
16. **THAT PARTY ALLEGED TO HAVE BEEN INJURED MADE COMPLAINT WHILE INJURY WAS RECENT** may be proved on the examination in chief in a trial for rape, but the details and circumstances of the transaction cannot be proved on such examination by her declarations. *Parker v. State*, 387.
17. **WHERE COURT, AT BEGINNING OF TRIAL FOR RAPE, ORDERS ALL WITNESSES TO BE EXCLUDED** from the court-room, but a material and competent witness for the accused, in disobedience of the order of the court, remains in the court-room during the examination of the witnesses, the court has no right to refuse to allow such witness to testify. A person on trial has the right to prove the truth relating to the accusation against him, by the evidence of all witnesses who have any knowledge of it, and he does not forfeit this right by the misbehavior of a witness. *Id.*
18. **ACCUSED IS NOT IN JEOPARDY**, until a jury of twelve competent men are selected and sworn. *People v. Barker*, 501.

See COSTS; EXTRADITION; JURY AND JURORS; WITNESSES.

CUSTOMS.

See FACTORS.

DAMAGES.

1. **ACTUAL DAMAGES ARE THOSE WHICH INJURED PARTY IS ENTITLED TO RECOVER FOR WRONGS RECEIVED** and injuries done when none were intended. Where the injuries and sufferings were intended or occur through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse, further damages, which have been variously termed "exemplary," "punitive," "vindictive," "compensatory," or "added" damages, may be given, agreeably to what would be right and just under the circumstances of each particular case. *Ross v. Leggett*, 608.
2. **PARTY IS LIABLE ONLY FOR PROXIMATE AND DIRECT RESULTS OF HIS ACTS**. Where person shoots a dog in the highway, and a woman standing near, whom he does not see at the time he fires, is so badly startled and frightened by the report of the gun as to seriously affect her health, the killing of the dog is in no sense the proximate cause of the injury to the woman. *Renner v. Canfield*, 654.
3. **COURT MAY INSTRUCT JURY TO CONSIDER AGE, HEALTH, CAPACITY TO EARN MONEY OF PERSON KILLED**, and the injury to his business as disclosed by the evidence, in an action brought for the benefit of the widow and next of kin, to recover damages for injuries causing death. *Clapp v. Minneapolis and St. Louis R. R. Co.*, 629.
4. **INTEREST MAY BE ALLOWED ON AMOUNT OF DAMAGES** awarded by the jury for property destroyed by the negligence of the defendant, from the time of its destruction, where it does not appear that anything more than actual compensation was awarded, unless the addition of interest would increase the damages to so great an extent as to be clearly unjust when the value of the property is taken into consideration. *Kendrick v. Towle*, 526.
5. **VERDICT OF FIVE THOUSAND DOLLARS FOR KILLING HEAD OF FAMILY**, a strong, healthy man, in middle life, accustomed to earn good wages,

who left a wife and children surviving him, will not be set aside as excessive. *Bolinger v. St. Paul etc. R. R. Co.*, 690.

See COVENANTS, 4; INTEREST; NEGLIGENCE; TELEGRAPH; TRESPASS.

DEBTOR AND CREDITOR.

CREDITOR'S RIGHT TO HAVE HIS DEBT SATISFIED BY SALE OF DEBTOR'S LAND NEVER EXISTED in this country or in England, except as given by statute. *Riggs v. Sterling*, 554.

See ACCORD AND SATISFACTION; RELEASE.

DEEDS.

1. **DELIVERY.** — Deed of real estate, acknowledged by grantor, containing the words "signed, sealed, and delivered in the presence of S. Michaels," placed in an envelope in grantor's table-drawer, with directions as to recording indorsed on envelope, is neither delivered to the intended grantee nor to any one else, and it conveys no title. *Stone v. French*, 237.
2. **INTENTION TO MAKE FUTURE DELIVERY OF DEED AND CONVEYANCE OF LAND AT DEATH** of grantor is not a delivery of such deed, and passes no interest in the land. *Id.*
3. **DEED NEITHER DELIVERED NOR RECORDED** by grantor during his lifetime is void. *Id.*
4. **ERRONEOUS MENTION OF INCIDENT IN HISTORY OF TITLE TO PIECE OF LAND IS WITHOUT FORCE** as against the mention of metes, bounds, courses, distances, and visible monuments, when the question is, whether the deed is sufficient, as to form, to convey the land intended. *Sherwood v. Whiting*, 116.
5. **COURTS SHOULD UPHOLD RATHER THAN DESTROY DEEDS;** and in the discharge of their duty in this respect, errors in description are frequently declared to be of no effect. *Id.*
6. **DEED — CONSTRUCTION AND EFFECT.** — The property intended to be conveyed was described as follows: "All the real estate of O. S., deceased, which was distributed to F. S. in the distribution of said estate, and afterwards conveyed to me by said F. S." In point of fact, F. S. had conveyed to the grantor before the distribution, and not after, and for the purpose of concealing the property from his creditors; but his deed fully described the land conveyed. In a suit to compel the heirs of the grantor to execute a corrected deed, *held*, that it needed no correction; if legally sufficient in form, such deed conveys a title which is unassailable; and for the purpose of determining its sufficiency in form, the only tests to be applied are those which would be applied to a deed executed upon a valuable consideration. *Id.*
7. **QUITCLAIM DEED**, or conveyance of all the grantor's right, title, and interest, vests in the purchaser only what the grantor himself could claim. The only exceptions to this rule are those founded upon the recording acts, or upon sales made under execution. *Allison v. Thomas*, 89.
8. **QUITCLAIM DEED TO LAND CONVEYS ALL GRANTOR'S INTEREST AND ESTATE** in such land, unless otherwise specified in the deed itself. *Johnson v. Williams*, 243.
9. **COVENANTS OF FORMER GRANTORS WHICH RUN WITH LAND PASS TO GRANTEE UNDER QUITCLAIM DEED.** — Grantee in a quitclaim deed obtains the right to any interest that may at any time come to grantees of his former grantors by virtue of covenants that run with the land. *Id.*

5. LEGATEE WHOSE LEGACY IS SPECIFIC IS ENTITLED TO CONTRIBUTION FROM HOLDERS OF OTHER SPECIFIC LEGACIES, if his legacy is appropriated to satisfy the lawful claims of the testator's widow, who has waived the provisions of the will in her favor. *Tomlinson v. Bury*, 464.
6. LAW OF SITUS PREVAILS OVER LAW OF DOMICILE as to the order of payment of debts of deceased, when decedent's estate is insolvent. *Deringer v. Deringer*, 150.

ESTOPPEL.

1. TO CREATE EQUITABLE ESTOPPEL, the person sought to be estopped must do some act or make some admission to influence the conduct of another, which act or admission is inconsistent with the claim he proposes now to make; and the other party must have acted on the strength of such act or admission. *New York Rubber Co. v. Rothery*, 822.
2. SILENCE DOES NOT CREATE ESTOPPEL, unless there was a duty to speak. *Id.*
3. ESTOPPEL. — Riparian proprietor, seeing proprietors on the opposite side of the stream building a mill-race to be used for the purpose of taking water out of the stream to supply a shop or factory, and not to be returned to the stream until after it passes his land, is not, by his failure to object to such mill-race during its construction, estopped from subsequently objecting thereto, and maintaining an action for damages occasioned thereby. *Id.*
4. ESTOPPEL. — Person representing that certain property belonged to one then negotiating a marriage is estopped from denying the truth of such representations, when to do so would disappoint expectations raised thereby. *Piper v. Hoard*, 789.
5. ISSUE OF MARRIAGE BROUGHT ABOUT BY FALSEHOOD AND FRAUD of defendant may call him to account for such fraud, and bind him to make good the thing in the manner in which he represented it, so that it shall be as he represented it to be. *Id.*

EVIDENCE.

1. ACCOUNT-BOOK, KEPT BY ONE UNABLE TO WRITE, IN WHICH ONLY ENTRIES ARE STRAIGHT MARKS to indicate the number of loads of sand delivered, is admissible in evidence, when supported by oath; and at all events, such person has the right to use the book as a memorandum to refresh and aid his memory. *Miller v. Shay*, 449.
2. ACCOUNT-BOOK IS BOOK OF ORIGINAL ENTRIES, when the marks therein are transferred the same day from marks on a cart made by a servant who delivered the loads. *Id.*
3. SERVANT IS COMPETENT AND NECESSARY WITNESS TO SUPPORT CHARGES AND PROVE DELIVERY, when goods are delivered by a servant, and his entries or marks are transferred to the master's account-book, which is offered in evidence. *Id.*
4. DECLARATIONS IN DISPARAGEMENT OF TITLE, made by the grantor while owner of the land, are admissible in evidence in favor of one claiming adversely to the grantee, and cannot be impeached by later and contradictory statements made by the grantor, after he parted with the title. *Royal v. Chandler*, 305.
5. ACTS AND DECLARATIONS OF GRANTOR SUBSEQUENT TO HIS DEED cannot be received in evidence to invalidate it. *Dudley v. Hurst*, 368.

6. CONCLUSION OR SUPPOSITION OF WITNESS IS NOT EVIDENCE against another person. *People v. Sharp*, 851.
 7. ADMISSIONS OF COPARTNER AND OF JOINT CONTRACTOR HAVE BEEN HELD ADMISSIBLE IN EVIDENCE to bind, not only themselves, but their co-defendants; but whether the admissions of a surety are proper evidence to bind a co-surety is a question undetermined in the particular case. *Mathews v. Phelps*, 581.
- See ALTERATION OF INSTRUMENTS; COMMON CARRIERS; CONTRACTS, 2, 3; COUNTERCLAIM; CRIMINAL LAW; NEW TRIAL; PLEADING AND PRACTICE; WITNESSES.

EXECUTIONS.

1. JUDGMENT IS NOT SUBJECT TO LEVY AND SALE UNDER EXECUTION. *Doe v. Dougherty*, 48.
2. SHERIFF'S ADVERTISEMENT FOR SALE OF LANDS need only state the day on which the sale will take place; it need not state the hours of that day between which it will be sold, as the law fixes that. *Evans v. Robberson*, 701.
3. PRESUMPTION WILL BE INDULGED THAT SHERIFF'S NOTICE OF SALE of land under execution was posted at the front door of the court-house, as required by law, when there is nothing to negative such presumption. *Id.*
4. EVERY REASONABLE PRESUMPTION WILL BE INDULGED in favor of sustaining the ministerial acts of officers making judicial sales. *Id.*
5. FAILURE OF SHERIFF TO POST NOTICE OF SALE of land under execution in front of the court-house, as required by law, is but an irregularity, which cannot affect the title of an innocent purchaser without notice, in a collateral proceeding, though it might be ground for setting aside the sale in a direct proceeding between the interested parties. *Id.*
6. SHERIFF'S DEED REGULAR IN FORM and properly acknowledged is admissible in evidence in support of the recitals therein contained. *Id.*
7. ACTION AT LAW BY EXECUTION PURCHASER TO TEST VALIDITY OF HIS TITLE IS NOT NECESSARILY BARRED because the judgment creditor has lost his equitable remedy to set aside the fraudulent conveyance by lapse of time. *Jackson v. Holbrook*, 684.

See EXEMPTIONS; SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

1. FOREIGN ADMINISTRATOR ACTS in this state by virtue of the power originally granted to him; and the laws of this state recognize him as such upon the mere production of his duly authenticated commission, and thereupon concede him the powers of administrator appointed by the courts here. *Deringer v. Deringer*, 150.
2. PAYMENT TO FOREIGN ADMINISTRATOR is good, although such administrator has neither given security nor recorded his letters of administration. *Id.*
3. CORPORATION CANNOT TAKE OUT LETTERS OF ADMINISTRATION under the laws of this state. *Id.*
4. CORPORATION MAY ACT AS ADMINISTRATOR when the law of the state does not require the administrator to take an oath, or to do any other act which a corporation is incompetent to perform. *Id.*
5. FOREIGN CORPORATION HAVING ACTED AS ADMINISTRATOR in the state where it was created may act as such in this state, and may bring suit here. *Id.*

See CORPORATIONS; JUDGMENTS.

EXEMPTIONS.

1. IN PLEADING EXEMPTION UNDER STATUTE, FACTS WHICH SHOW the property to be exempt should be clearly set forth; but an objection on that ground after all the proof has been admitted comes too late, and an amendment should be permitted to remedy the defect. *McCoy v. Breanan*, 589.
2. EACH MEMBER OF FIRM AGAINST WHICH EXECUTION IS LEVIED MAY CLAIM STATUTORY EXEMPTION from such process, and the right of a partner to make such claim is not affected by the fact that he has drawn more than his share out of the firm assets. This question can only be reached by proceedings in equity upon an accounting and winding up of the partnership. *Id.*
3. IT IS NOT NECESSARY THAT PARTNER SHOULD BE ACTIVE MEMBER OF FIRM TO ENTITLE him to his statutory exemption. A married woman who is a member of a firm, though residing with her husband a long distance from the place of business of the firm, and mainly occupied in house-keeping, is nevertheless entitled to claim her statutory exemption in the firm property. *Id.*
4. STATUTORY RIGHT OF EXEMPTION IS INDIVIDUAL RIGHT, which one partner may enforce in a separate suit as an individual. *Id.*
5. CREDITORS CANNOT RELY UPON ANY QUESTION OF FRAUD in dealing with exempt property. *Freehling v. Bresnahan*, 617.
6. UNDER EXEMPTION LAWS, HUSBAND MUST BE CONCLUSIVELY PRESUMED TO RESIDE WITH HIS FAMILY, where they occupy the old home with his consent, and there has been no separation between the husband and wife; and he cannot, by his voluntary absence, deprive his family of their rights in the enjoyment of the household property, nor will it cease to be exempt while so held. *Id.*

See HOMESTEADS; SHERIFFS.

EXPERTS.

See COMMON CARRIERS, 10.

EXTRADITION.

1. FUGITIVES FROM JUSTICE — CONSTITUTIONALITY OF STATE LAW. — The state statute of the 17th of February, 1881, authorizing arrest and detention of fugitives from justice, does not conflict with section 2, article 4, of the constitution of the United States, or with sections 5278 and 5279 of the Revised Statutes thereof. *Kurtz v. State*, 173.
2. FUGITIVE FROM JUSTICE. — Either the original affidavit, or a copy thereof duly certified as authentic by the governor of the state whence the fugitive has fled, is sufficient to authorize the action of the governor of the state where the fugitive is found. Alleged fugitive from justice cannot impeach the validity of the affidavit upon which the requisition is based, if it distinctly charge the commission of an offense. *Id.*
3. FUGITIVE FROM JUSTICE. — Governor of the requesting state is the only judge of the authenticity of the affidavit. *Id.*
4. CERTIFICATE, THAT AFFIDAVIT UPON WHICH REQUISITION for fugitive from justice is founded "is duly authenticated according to the laws of said state," is sufficient. *Id.*
5. "MAGISTRATE." — This word in section 5278, Revised Statutes, relating to fugitives from justice, includes an assistant police magistrate of a city. *Id.*

6. **RES ADJUDICATA DOES NOT APPLY TO JUDGMENTS** on *habeas corpus* in cases of extradition. *Id.*
7. **IN HABEAS CORPUS PROCEEDINGS IN EXTRADITION CASES**, the merits of the case cannot be considered. The only subjects of inquiry are the sufficiency of the papers and the identity of the prisoner. *Id.*

FACTORS.

1. **FACTOR IS NOT RESPONSIBLE TO HIS PRINCIPAL FOR DIFFERENCES IN GRADES** of grain, in the market to which it is consigned, from those established at other places, in the absence of special instructions. The principal assumes the risk of that when he selects his market. *Davis v. Kobe*, 663.
2. **FACTOR WHO HAS MADE LARGE ADVANCES TO HIS PRINCIPAL** upon property consigned to him for sale, which property has become doubtful security for his reimbursement, and who has repeatedly demanded repayment of his advances, or security therefor, without compliance by the principal, may, after reasonable notice to his principal, with reasonable discretion and in good faith, sell the property, although directed by the principal to hold it longer. *Id.*
3. **FACTOR TO WHOM WHEAT IS CONSIGNED FOR STORAGE IN ELEVATOR**, and for sale, may store it in a mass in a bin with other wheat of the same grade and quality, in the absence of instructions from the consignor to the contrary. *Id.*
4. **COURTS TAKE JUDICIAL NOTICE THAT IT IS CUSTOMARY TO STORE WHEAT IN MASS** with other wheat of the same grade and quality in general commercial elevators. *Id.*

FALSE IMPRISONMENT.

1. **OFFICERS WHO MAKE WRONGFUL ARREST ARE ANSWERABLE JOINTLY**, in an action for false imprisonment, with those who cause and take part in a subsequent detention under it; although, if the arrest had been lawful, they would not be liable for a subsequent wrongful imprisonment in which they took no part. *Bath v. Metcalf*, 455.
2. **OFFICERS WHO CAUSE AND TAKE PART IN PROLONGING IMPRISONMENT OF ONE ARRESTED WITHOUT WARRANT**, beyond the doors of the lock-up, for the purpose of sending him out of town, after the marshal has reason to believe him innocent, and has made up his mind to release him, are liable in an action for false imprisonment, even if the arrest had been lawful, and *a fortiori* if the arrest was unlawful. *Id.*
3. **VERDICT AGAINST ALL OFFICERS JOINTLY, IN ACTION FOR FALSE IMPRISONMENT**, is PROPER, but only for the imprisonment between the lock-up and the railroad station, and on the ground that the arrest was wrongful, where a person was arrested, without a warrant, on a charge of felony, by two police-officers of a city, and taken to the lock-up, and afterwards the city marshal, having reason to believe that the prisoner was innocent, and having made up his mind to release him, sent him, the assistant marshal taking part in such act, from the lock-up to the railroad station, in the custody of another officer. *Id.*

FIXTURES.

1. **EVERYTHING REGARDED BY LAW AS FIXTURE, AS BETWEEN MORTGAGOR AND MORTGAGEE**, is sufficiently covered by a mortgage of a farm, "together

with the buildings and improvements thereupon, and the rights, roadways, waters, privileges, appurtenances, and advantages thereto belonging or in any wise appertaining." *Dudley v. Hurst*, 368.

2. **MACHINERY USED IN CANNING BUSINESS IS FIXTURE**, and, as between the mortgagor and the mortgagee of the land upon which it is erected, will pass to the latter, where parts of it are attached to the soil and the other parts are necessary to the use of the parts so attached. *Id.*
3. **WHERE PRINCIPAL PART OF MACHINERY BECOMES FIXTURE BY ACTUAL ANNEXATION** to the soil, such part of it as may not be so physically annexed, but which, if removed, would leave the principal part unfit for use, and would not of itself and standing alone be well adapted to general use elsewhere, is considered constructively annexed. *Id.*

FRAUD.

1. **ILLEGAL ACTS PREJUDICIAL TO RIGHTS OF OTHERS** are frauds on those rights, although the parties are innocent of any intention to commit a fraud. If the act is in effect a fraud upon the creditor, the motives of the parties are of no consequence. *Logan v. Logan*, 212.
2. **FRAUD IS NOT MITIGATED** by showing that it consisted of fraudulent representations, made to induce a woman to marry from mercenary motives. *Piper v. Hoard*, 789.

FRAUDULENT CONVEYANCES.

1. **MORTGAGE OF STOCK OF GOODS IN TRADE**, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion in the usual course of his business, is essentially fraudulent as to creditors of the mortgagor, even though the agreement permitting such sales is not shown upon the face of the mortgage, but is proved *aliunde*. *Logan v. Logan*, 212.
2. **FACT THAT CONVEYANCE, UNDER WHICH TITLE APPEARS TO BE IN THIRD PERSON, IS FRAUDULENT**, and of no effect, may be established by a suit in equity, or it may be proved in an action at law by any competent evidence. *Jackson v. Holbrook*, 683.
3. **JUDGMENT CREDITOR—FRAUDULENT CONVEYANCE BY DEBTOR.**—A judgment creditor has the right to proceed to an execution sale of property which the debtor had fraudulently mortgaged, but such right does not prevent his resorting to equity to cancel the fraudulent instrument. *Logan v. Logan*, 212.
4. **WHEN CREDITOR SEEKS AID OF COURT OF EQUITY** for the satisfaction of a judgment out of the property of his debtor, the title to which property has been in the debtor, but has been fraudulently transferred, it is sufficient for the creditor to show a judgment at law and execution to entitle him to resort to equity to vacate such fraudulent conveyance. *Id.*
5. **CREDITOR HAS NO RIGHT OF ACTION** against the parties procuring the fraudulent conveyance to be executed, for their conduct in so doing, but he can successfully attack the conveyance for fraud apparent upon it, by which his rights are affected. *Id.*

FUGITIVES FROM JUSTICE.

See EXTRADITION.

GAMING.

1. **MONEY LOANED WITH INTENT ON PART OF LENDER** that it shall be used for gambling purposes by the borrower cannot be recovered if so used. *Tyler v. Carlisle*, 301.
2. **MONEY LOANED FOR GAMBLING PURPOSES**, but not so used by the borrower, may be recovered of him by the lender. *Id.*
3. **SALE OF GOODS TO BE DELIVERED IN FUTURE** is valid, though there is an option as to the time of delivery, and the seller has no means of getting them but to go into the market and buy. But if, under guise of such contract, valid on its face, the real purpose and intention is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and the market price only paid, the transaction is a wager, and the contract void. *Crawford v. Spencer*, 745.
4. **TO RENDER CONTRACT FOR SALE OF GOODS** to be delivered in future void as a wagering contract, it is not enough that one party only intended a speculation in prices; it must be shown that both parties did not intend a delivery of the subject-matter, but contemplated and intended only a settlement of the difference between the contract and the market price. *Id.*
5. **BROKER MAY NEGOTIATE CONTRACT FOR SALE** of goods to be delivered in future, without being privy to an illegal intent of the principals, rendering it void; and being innocent, he has a meritorious ground for the recovery of compensation for services and advances. *Id.*
6. **WHEN BROKER IS PRIVY TO UNLAWFUL DESIGN OF PARTIES** to a contract for the sale of goods, to be delivered in future, and brings them together for the purpose of entering into the illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction. *Id.*
7. **WAGERING CONTRACT FOR FUTURE SALES** is not within the provisions of the Missouri criminal statutes, making gambling notes void in the hands of the holder; therefore a note based on such contract is not void in the hands of an indorsee before maturity, simply because based upon such consideration. *Id.*
8. **NOTE BASED UPON ILLEGAL WAGERING CONTRACT** assigned as collateral, with an extension of time for the payment of the principal debt, constitutes the assignee a holder for value for a new consideration, and freed from the equities existing between the original parties of which he has no notice, the collateral not being due when assigned, and he can enforce his security to the extent of the debt due him from his assignor. *Id.*

GROWING TREES.

See DEEDS, 15, 16; TRESPASS, 2-4.

GUARANTY.

- IN CONSTRUING CONTRACT OF GUARANTY**, GENERAL RULE ARISING FROM IMPLICATION OF LANGUAGE USED IS, that when the amount of the liability is limited, and the time is not, the contract should be construed as a continuing guaranty. *Mathews v. Phelps*, 581.

HABEAS CORPUS.

See EXTRADITION, 6, 7.

HIGHWAYS.

1. **PRIMARY OBJECT OF PUBLIC STREETS AND HIGHWAYS** is to furnish a passage-way for travelers in vehicles or on foot; and while they may be put to numerous other uses, such uses must be enjoyed in subordination to this primary object. *People v. Squire*, 893.
2. **POWER TO CONTROL PUBLIC STREETS, AND TO PROVIDE FOR PROPER ADJUSTMENT** of conflicting rights and interests therein, is a police power, the exercise of which may be delegated to municipal corporations. *Id.*
3. **OBSTRUCTION TO STREETS IS ORDINARILY NUISANCE**, if it interferes with their use by the public for travel and transportation. Abutting owner to street may temporarily encroach thereon by the deposit of building materials, if engaged in building. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of the street for public travel may be interfered with in a variety of other ways without creating a nuisance. *Callanan v. Gilman*, 831.
4. **OBSTRUCTION OF STREETS CAN ONLY BE JUSTIFIED BY NECESSITY**, and even then it must be reasonable, with reference to the rights of the public, who have interests in the streets, which may not be sacrificed or disregarded. *Id.*
5. **WHETHER OBSTRUCTION IN STREET IS NECESSARY AND REASONABLE** is generally a question of fact. *Id.*
6. **APPROPRIATION OF STREET TO PRIVATE USE** by one doing business thereon will not be permitted. The maintenance of a bridge across a sidewalk for hours during each business day, over which goods are conveyed to and from a store, is a public nuisance. *Id.*
7. **TO RECOVER FOR PUBLIC NUISANCE**, plaintiff must allege and prove that he has sustained special damage, different from that sustained by the general public. Such special damage is sufficiently shown when it appears that the plaintiff has a store adjacent to the alleged nuisance, and that the nuisance prevents plaintiff, his employees and patrons, from reaching such store by passing along the sidewalk in front thereof. *Id.*
8. **OBSTRUCTION OF SIDEWALK CANNOT BE JUSTIFIED** by showing that defendant allowed pedestrians to pass around or through his store, or over his elevated stoop, between moving barrels and packages. *Id.*
9. **JUDGMENT ENJOINING OBSTRUCTION OF SIDEWALK** should not prevent the defendant from making any use whatever of such obstruction, but should be limited to restraining him from "unnecessarily or unreasonably obstructing such sidewalk, or from unnecessarily or unreasonably hindering or preventing plaintiff, or his employees, servants, and customers, from having the convenient use of and passage along the sidewalk." *Id.*
10. **GRANTEE, UNDER POWER OF SALE IN MORTGAGE, IS LIABLE FOR INJURIES SUFFERED BY PERSON WALKING ON SIDEWALK IN FRONT OF PREMISES**, by reason of a defect in the cover of a coal-hole, existing, and open and visible, at the time of the sale, where the owner of the equity of redemption released any title he might have to the grantee, and remained in possession as a tenant at will, and was in occupation at the time of the injury. *Dalay v. Savage*, 429.
11. **SIDEWALK.** — One who maintains a hole in a sidewalk in front of his premises in a populous city, over which is a movable trap-door, is answerable to a person who is injured by falling through such hole at a time when it was open and unguarded, though it is not shown by whom the door

was removed and the hole left open and unguarded. *Barry v. Terkildsen*, 55.

12. **RIGHT TO KEEP OPENINGS IN SIDEWALKS** in front of one's premises, if it exists at all, must come from legislative declaration, municipal license, or general usage. *Id.*
13. **PLAINTIFF IS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE**, because, assuming a sidewalk in a populous city to be safe, she permitted her attention to be momentarily attracted in another direction, and fell into a hole in such sidewalk, from which the covering had been removed. *Id.*

See ICE; LANDLORD AND TENANT, 6.

HOMESTEADS.

1. **HOMESTEAD EXEMPTION IS NOT IN DEROGATION OF COMMON LAW**, but is rather the limitation and exclusion of that exemption. The rule requiring strict construction has therefore no application to homestead statutes, as against the debtor, or to the constitutional provision securing to him a homestead. *Riggs v. Sterling*, 554.
2. **HOMESTEAD EXEMPTION STATUTES AND CONSTITUTIONAL PROVISIONS ARE CONSTRUED WITH FAVOR**, liberally, and in accordance with their equity and spirit. *Id.*
3. **HOMESTEAD EXEMPTION, AS ESTABLISHED BY CONSTITUTION AND LAWS OF MICHIGAN, IS NOT ALONE FOR HUSBAND**, and his protection, but for the benefit of the wife and children as well. *Id.*
4. **HOMESTEAD EXEMPTION IS NOT ONLY PRIVILEGE CONFERRED**, but under the constitution of Michigan it is an absolute right; and was intended to secure against creditors a home, and to a certain extent the means of support, to every family in the state. *Id.*
5. **OCCUPANCY IS ITSELF EVIDENCE OF ELECTION AS HOMESTEAD**, in Michigan, by the owner of the parcel occupied, and a notice to all of its homestead character, and of his selection, and the extent thereof, to enable him to enjoy the fullest protection of the law, where the land claimed as a homestead is within the quantity limited by the constitution, and is occupied by the owner. *Id.*
6. **HOMESTEAD, WITHIN CONSTITUTIONAL LIMIT AS TO QUANTITY, WHEN ONCE ESTABLISHED**, in Michigan, by election, selection, and occupancy, is secure from the claims of creditors, unless it exceeds in value fifteen hundred dollars; in which event, if it is capable of division, the creditor may apply to a court of equity to have it divided, if the debtor will not consent thereto; but if in any case the homestead is incapable of division, it may be sold in the manner provided by statute, and the sum of fifteen hundred dollars shall be reserved and paid to the debtor with any excess after satisfying the execution. *Id.*
7. **EXCESS OF VALUE WILL NOT MAKE ANY OTHER ACTION ON PART OF DEBTOR NECESSARY**, in Michigan, until after the appraisal provided for by statute has been made, where the debtor has selected his homestead, which is within the constitutional limit as to quantity; and in the absence of such appraisal, or a division had under the order or decree of a court of equity, no valid sale of the homestead so selected, or any part thereof, can be made by the sheriff. *Id.*
8. **HOMESTEAD, ONCE ESTABLISHED, CAN NEVER BE WAIVED**, in Michigan, except by abandonment, or alienated, except by deed of some kind; but prior to an election and selection by the owner, it may be waived by failure to make such election and selection before sale by the sheriff. *Id.*

9. **WAIVER OF HOMESTEAD RIGHT BY HUSBAND CANNOT AFFECT WIFE'S INTEREST THEREIN;** nor can the abandonment or waiver thereof by one entitled to its enjoyment affect the interest of any other person equally entitled thereto. *Id.*
10. **WIFE DOES NOT AFFECT HER HOMESTEAD RIGHT BY TAKING DEED OF HOMESTEAD** from her husband without consideration, and such a conveyance cannot be considered in fraud of creditors. *Id.*
11. **PRICE OBTAINED FOR HOMESTEAD ON EXECUTION SALE IS NOT CONCLUSIVE** as to its value in ejectment for the possession of the property under the sale. *Id.*
12. **COURT DOES NOT ABUSE ITS DISCRETION IN LIMITING NUMBER OF WITNESSES** as to the value of the homestead to six on each side, where the only question in an action of ejectment for the possession of the property under an execution sale was as to the value. *Id.*
13. **PERSON CANNOT LAWFULLY HOLD TWO HOMESTEADS** at the same time. *Kaes v. Gross, 767.*
14. **WHEN HOMESTEAD IS ABANDONED,** an intention to return, by which the homestead rights are preserved, must be formed at the time of removal. It can have no influence in restoring the right once lost by actual abandonment, until executed by actual resumption of occupancy. A subsequent unexecuted intention to resume possession would not restore the right to hold the homestead exempt. *Id.*
15. **WHEN HOMESTEAD RIGHT IS LOST BY ABANDONMENT** and possession is again resumed, it only gives origin to a new homestead right, dating from the new occupancy, and having no retroactive validity on the old right, and possessing no force against the rights of third persons acquired in the interim between the loss of the old and the acquisition of the new right. *Id.*
16. **REMOVAL OF FAMILY FROM HOMESTEAD** constitutes a *prima facie* case of abandonment, and raises a presumption against the claim of homestead, which must be rebutted before such claim can be successfully asserted. *Id.*
17. **LENGTH OF TIME THAT CLAIMANT** is absent from homestead constitutes an important factor, in connection with other facts, in determining whether the aggregate result of all the facts is sufficient to establish that a forfeiture of the acquired right has occurred. *Id.*
18. **PROLONGED ABSENCE FROM HOMESTEAD,** like the removal of the family, is sufficient to cast the *onus* of rebutting the presumption of abandonment on the claimant of the homestead. *Id.*
19. **ABANDONMENT OF HOMESTEAD IS QUESTION OF FACT,** each case resting upon its own peculiar circumstances, yet actual removal with no intention to return amounts to a forfeiture of the right as against creditors and purchasers, although no new homestead right is acquired. *Id.*
20. **REMOVAL FROM HOMESTEAD,** coupled with the acquisition of a new home elsewhere, is conclusive proof of abandonment of the old homestead. *Id.*
21. **WIDOW RESIDING UPON HER HOMESTEAD,** who remarries and immediately removes with her children and household goods to the home of her new husband, without expressing an intention of returning to her old homestead, must be considered as abandoning her old homestead. *Id.*
22. **WIDOW RESIDING ON HOMESTEAD, WHO REMARRIES,** is as fully competent to form an intention of abandonment of the homestead as if she remained single, and she is as fully affected by the usual unfavorable presumptions attendant on removal and prolonged absence from her old homestead.

and is as much bound to overcome such presumptions, to be successful, as is any other person. The acquisition of a new homestead, at the residence of her second husband, is conclusive proof of her abandonment of the old one. *Id.*

23. HUSBAND CANNOT BY DEVISE, or by his sole deed, convey or mortgage the homestead: Mo. R. S., sec. 2689. *Id.*
24. VALID MORTGAGE OF LAND ENTERED AS HOMESTEAD UNDER LAWS OF UNITED STATES may be made by the claimant after he has received his final certificate, and before the patent therefor has been issued to him. *Lewis v. Wetherell*, 674.

HOMICIDE.

See CRIMINAL LAW, 15.

HUSBAND AND WIFE.

1. FINDING THAT HUSBAND ACTED AS DULY AUTHORIZED AGENT OF WIFE, in employing a person to perform labor upon the wife's house, is justified, in a proceeding to enforce a mechanic's lien therefor, by evidence that the husband had general management of the property, that he employed the petitioner to perform the labor, that the wife knew he was working upon the house, and that she personally gave him directions as to parts of the work. *Wheaton v. Trimble*, 463.
2. WIFE WHO HAS BEEN DESERTED BY HUSBAND MAY MAKE BINDING CONTRACT FOR MEDICAL SERVICES. Such services are regarded in law as "necessaries," the same as food and clothing. *Carstens v. Hanselman*, 606.
3. MARRIED WOMEN HAVE NOT GENERAL POWER UNDER MICHIGAN STATUTES TO MAKE AGREEMENTS of all kinds, but they must necessarily be able to make contracts concerning what it is essential for their safety and security to procure. *Id.*
4. HUSBAND WHO DESERTS HIS FAMILY, AND DOES NOTHING FOR THEIR SUPPORT, may be regarded as refusing to perform the contracts of his wife for necessaries, within the meaning of a statute which makes a wife liable to be sued upon any contract on which her husband is not liable, or where he refuses to perform it. *Id.*
5. EVIDENCE OF AGREEMENT BETWEEN GRANTOR AND HUSBAND OF GRANTEE, by which the grantor released his claim to timber excepted by the deed, is inadmissible in an action of replevin by the grantor for the timber, and should not be submitted to the jury, where no agency of the husband was shown, and where the alleged settlement was made by the husband long after his wife had conveyed the land to strangers, and several years after he had separated from his wife. *Wait v. Baldwin*, 551.
See DURESS; EXEMPTIONS, 6; HOMESTEAD; SURETYSHIP; WILLS, 14.

ICE.

1. RIGHTS OF TRAVELING UPON OR OF HARVESTING ICE upon a navigable river are not absolute in any person, but are public rights, which belong to the whole community; their enjoyment depends very much upon first appropriation, as one man's possession may exclude others. *Woodman v. Pitman*, 342.
2. RIGHT TO TRAVEL UPON AND TO HARVEST ICE on navigable rivers are relative or comparative. Each must be exercised reasonably, depending upon the importance of the different rights in different localities, and the benefits which the community derive therefrom. *Id.*

3. **LEGISLATURE HAS CONSTITUTIONAL AUTHORITY** to provide rules regulating the possession and cultivation of ice upon navigable rivers, where the tide ebbs and flows, at least so far as the business is carried on below low-water mark, and it may provide for the adjustment of conflicting interests which may affect that privilege. *Id.*
4. **IN ABSENCE OF STATUTE, JUDICIAL AUTHORITY** may determine the manner in which the privileges of the possession and cultivation of ice on navigable rivers may be best enjoyed by the public, provided no violence is done to existing law. *Id.*
5. **PRIVILEGE OF HARVESTING ICE** on the Penobscot River at Bangor, and for some distance below, is incomparably greater than that of traveling on the ice, and the latter privilege cannot be set up to prevent or abridge the former to any extent whatever. *Id.*
6. **RIGHT OF TRAVEL ON ICE** on navigable rivers in all places is generally inferior to the right of navigation. Whether it can ever become a superior right depends upon circumstances. *Id.*
7. **HARVESTING ICE ON NAVIGABLE RIVERS** becomes a nuisance when only actual injury is sustained by the public, and an unlawful obstruction to navigation is caused thereby. *Id.*
8. **ICE-FIELDS ON NAVIGABLE RIVERS**, after being staked, fenced, and scraped, and, in some instances, connecting fields extending across the river, are so far the property of the appropriator that an action will lie against one who disturbs his right. *Id.*
9. **APPROPRIATORS OF ICE ON NAVIGABLE RIVERS** should by suitable means reasonably guard their fields from danger to persons who may be likely to innocently intrude upon them. But the former are not liable for the negligence of the latter, to which they do not contribute. *Id.*
10. **THOUGH APPROPRIATOR OF ICE** on navigable river may have left his field unprotected from danger to a traveler, still he is not liable for an injury caused by the traveler's negligence and want of exercise of ordinary care. *Id.*

INFANCY.

1. **INFANT MAY AVOID CONTRACT OF PERSONAL NATURE**, or one relating to personal property, either before or after his majority. *Adams v. Beall*, 379.
2. **MONEY PAID BY MINOR, IN CONSIDERATION OF HIS BEING ADMITTED AS PARTNER** in a business, cannot, on his voluntarily withdrawing from the partnership into which he had actually entered, and in which he had remained for more than a year, be recovered by him, unless he was induced to enter into the partnership by the fraudulent representations of the party to whom he paid the money. *Id.*

See **MASTER AND SERVANT**, 16-19; **NEGLIGENCE**, 5, 6.

INJUNCTIONS.

1. **INJUNCTION WILL NOT LIE TO RESTRAIN LAND-OWNER FROM ERECTING AND USING** a structure on his premises to overlook exhibitions on adjoining grounds to which an admission fee is charged, as those of a base-ball club, where it does not appear that the complainant enjoys any exclusive franchise from the legislature, or under any provision of the city charter or by-laws, or under any resolution or other action of the city council, in the use of its grounds. If in such case the complainant has been pecuniarily injured, the remedy at law is wholly adequate. *Detroit Base-ball Club v. Deppert*, 566.

2. **INJUNCTION WILL BE GRANTED TO OWNER OF FARM HAVING ON IT LARGE CANNING FACTORY** in full operation, with a large growing crop of corn to be canned, to prevent a threatened sale and removal of the canning machinery. *Dudley v. Hurst*, 368.
3. **INJURY IS IRREPARABLE WHICH CANNOT BE MEASURED** by any known pecuniary standard. *Id.*

INNKEEPERS.

1. **LAW IMPOSES ON INNKEEPER EXTRAORDINARY LIABILITY** for the protection of the baggage of his guest. He can avoid it only on the grounds of the loss having been occasioned by the act of God, the public enemy, the misconduct of the guest, or of the friend he brings with him. *O'Brien v. Vaill*, 219.
2. **INNKEEPER'S LIABILITY AS SUCH CEASES** when his guest pays his bill and departs, announcing that he would be gone a few days, but would leave his baggage to be cared for till his return. The innkeeper's subsequent duty is that of a gratuitous bailee of such baggage, liable only for gross negligence. *Id.*
3. **IT IS NOT NEGLIGENCE IN LAW FOR GUEST AT HOTEL TO RETAIN \$495 IN BELT** on his person while sleeping in a room by himself, although the bolt of the door to his room could be opened by a wire from the outside. *Smith v. Wilson*, 669.
4. **INNKEEPER'S LIABILITY IN RESPECT TO HIS GUEST'S MONEY IS NOT LIMITED TO SUCH SUM** as is necessary for the guest's traveling expenses. *Id.*
5. **GUEST'S FAILURE, UPON RETIRING, TO BOLT DOOR, AFTER HAVING LOOKED IT, IS NOT SUCH NEGLIGENCE** on his part as will defeat an action by him against the innkeeper, to recover the value of property stolen from the room during the night, if the existence of the bolt was not known to him, and his attention was not in any way called to it. *Spring v. Hager*, 451.

INSANITY.

INSANITY.—Belief in spiritualism does not of itself show insanity, unless it amounts to a monomania. *Connor v. Stanley*, 84.

INSOLVENCY.

JUDGMENT AGAINST INSOLVENT ENTERED AFTER GRANTING OF DISCHARGE is conclusive against him, if regularly obtained. *Anderson v. Goff*, 34.

INSURANCE.

1. **GENERAL AGENT OF FIRE INSURANCE COMPANY** may waive a condition inserted in the policy issued by the company. Condition in policy of insurance is waived by the issuing of such policy by a general agent, who at that time knows of and assents to facts which constitute a breach of such condition. *Kruger v. Western Fire etc. Ins. Co.*, 42.
2. **WAIVER OF BREACH OF CONDITION AT ISSUANCE OF POLICY** of insurance continues in favor of all renewals granted of such policy. *Id.*
3. **INSURANCE COMPANY IS DEEMED TO HAVE WAIVED CONDITIONS OF POLICY** making a misstatement as to encumbrances upon the property to avoid the insurance, where it had knowledge at the time of the application that the property was encumbered. *Wilson v. Minnesota etc. Ins. Ass'n*, 659.

- LIFE INSURANCE — FORFEITURE OF PAID-UP POLICY.** — A policy of life insurance provided that it should become void on failure to pay any annual premium, or interest annually in advance on any outstanding premium notes; but that, after the payment of two or more annual premiums, on default in the payment of any subsequent premium, the company would convert the policy into a "paid-up" one for as many tenth parts of the sum originally insured as there had been complete annual payments when default was made, provided application was made for such conversion within one year after default. The insured paid two annual premiums, a portion in cash, and the balance in premium notes still outstanding, made default in the payment of the next premium, and applied for a "paid-up" policy. Thereupon the company indorsed upon the policy that it was recognized as binding for two tenths thereof, "subject to the terms and conditions expressed in the policy." Thereafter the insured paid the interest on the outstanding premium notes, annually, in advance, for two years, and then ceased to pay the same. In an action to recover the amount due on the policy, *held*, that the company's indorsement upon the policy was equivalent to a "paid-up" policy, and that the failure to pay interest on the outstanding premium notes worked a forfeiture thereof. *Holman v. Continental Life Ins. Co.*, 97.
5. **"PAID-UP" POLICY OF LIFE INSURANCE MAY BE FORFEITED BY NON-PAYMENT** of interest on premium notes, given for premiums accruing while the original policy remained in force. *Id.*
 6. **NAMING POLICY OF INSURANCE NON-FORFEITABLE** does not render inapplicable the rule that a writing must be construed by its terms, and if by these it is forfeitable, a defense showing the existence of facts, which by these terms create a forfeiture, must be sustained. *Id.*
 7. **WHERE POLICY OF INSURANCE, CONTAINING COVENANT THAT INSURANCE SHOULD CONTINUE** and be in force from the expiration of the time mentioned therein for its duration so long as the insured or their assigns should continue to pay the like premium, provided such premium were actually paid to the company and indorsed on the policy, or a receipt given therefor by the company, is issued under seal to a firm then composed of two members, but to which a third member is afterwards admitted without change in the name of the firm, and the firm so constituted continues to pay the premium as covenanted in the policy, taking renewal receipts therefor not under seal, upon the happening of a loss, the firm as constituted at the date of the renewal receipt cannot maintain an action of *assumpsit* thereon. But such firm, so constituted, may maintain such an action on another renewal receipt given by the same company, where the policy issued to the firm before the admission of the new partner contained no covenant for its extension from year to year, but expressly declared that the insurance should continue for the term of one year, and no longer. And want of notice to the insurance company of the change in the firm cannot affect the right to recover in that case. *Firemen's Ins. Co. v. Floss*, 398.
 8. **INSURANCE COMPANY WILL BE REGARDED AS HAVING WAIVED OBJECTIONS TO PRELIMINARY PROOFS** of loss, if it withholds or fails to disclose such objections beyond a reasonable time after such proofs are furnished, or if its refusal to recognize the obligation to pay is placed by it upon other and distinct grounds than alleged defects in the preliminary proofs. *Id.*
 9. **INSURANCE COMPANY DOES NOT HOLD SURPLUS OR PROFITS AS TRUST FUND** for the benefit of the holders of policies on the tontine savings fund as-

surance plan, under the New York law, where, by its policies, it agrees that the surplus or profits derived from such policies as shall cease to be in force before the completion of their respective tontine dividend periods shall be appointed equitably among such policies as shall complete such periods. *Pierce v. Equitable Life Assurance Society*, 433.

10. BILL IN EQUITY CAN BE MAINTAINED AGAINST INSURANCE COMPANY BY HOLDER OF TONTINE POLICY, who is to be regarded as a creditor, and not a member of the corporation, and without joining the other policyholders of his class, or suing on their behalf, to obtain an account of the surplus or profits derived from such policies as should cease to be in force before the completion of their respective tontine periods, which were to be apportioned equitably among such policies as should complete such periods, although the defendant is incorporated in another state, outside of which it is a great inconvenience for it to account, but not an insuperable one, it having a place of business, and an agent to receive service of process in the state where the suit is brought, and it having waived any objection to the exercise of the jurisdiction of the court by appearing generally and answering to the merits. *Id.*

See CORPORATIONS, 24.

INTEREST.

- INTEREST IS NOT ALLOWABLE in an action for the breach of a contract, if the damages sought to be recovered are so unliquidated and uncertain that they must be made certain by proof and adjudication. *Coburn v. Goodall*, 75.

See DAMAGES, 4.

INTERPLEADER.

- INTERPLEADER — JURY TRIAL. — Where, under the code, the defendant obtains an order substituting a third party as defendant, and pays the moneys claimed into court, in order that the substituted defendant and the plaintiff may litigate and determine their respective claims to such moneys, the action thereupon becomes an equitable suit, in which neither party is entitled to a jury trial, and the verdict of a jury, if one is called, may be disregarded by the court. *Clark v. Mosher*, 798.

JUDGMENTS.

1. JUDGMENT QUIETING TITLE, FOUNDED ON SERVICE OF SUMMONS by publication, will be respected and enforced in this state, as a complete divestiture of the title of the judgment defendant. *Venable v. Dutch*, 260.
2. JUDGMENT BASED ON ALIAS SUMMONS issued without any return of the original, and which imperfectly states the nature of the cause of action and fails to notify the defendant to appear and answer at the office of the justice, is not void. *Dore v. Dougherty*, 48.
3. PERSONAL JUDGMENT AGAINST NON-RESIDENT whose property has been attached within the state is valid, and sufficient to sustain a sale of such property made under such judgment, though the service of summons was by publication. *Anderson v. Goff*, 34.
4. JUDGMENT IS LIEN UPON ACTUAL, not the apparent, interest of the defendant. *Burks v. Johnson*, 252.
5. IN MINNESOTA, HOLDER OF JUNIOR JUDGMENT LIEN ACQUIRES NO PREFERENCE OVER SENIOR JUDGMENT LIEN by virtue of prior proceedings to

execute his judgment, the senior judgment creditor not being a party to such proceedings. Nor is a different rule applied where the judgment debtor has made fraudulent conveyances, which are void alike as respects both. The judgments, in such cases, are liens at law, and as to real estate necessarily take precedence according to the date of the record. *Jackson v. Holbrook*, 683.

6. JUDGMENT CREDITOR MAY REST EXCLUSIVELY UPON HIS RIGHTS AND REMEDIES AT LAW, without invoking the aid of a court of equity. *Id.*
7. SALE UPON JUNIOR JUDGMENT IS SUBJECT TO ALL SUCH PRIOR JUDGMENTS as are in fact liens upon the land sold, and the purchaser at such sale takes subject to the lien of a senior judgment. *Id.*
8. JUDGMENT FOR DEFENDANT, ON MERITS, IN ACTION FOR SPECIFIC PERFORMANCE of a contract for the sale of real estate, is a bar to another action to reform the same contract, and to enforce it as reformed. *Thomas v. Joslin*, 624.
9. PARTY IS BOUND BY HIS ELECTION TO SUE ON WRITTEN CONTRACT as executed, where he proceeds to trial and judgment in such suit, and he cannot thereafter bring an action to reform the contract. *Id.*
10. ERRONEOUS JUDGMENT IS VALID UNTIL REVERSED, AND PROTECTS PLAINTIFF in enforcing it. *Peck v. McLean*, 655.
11. DEFENDANT, AFTER REVERSAL OF ERRONEOUS JUDGMENT AGAINST HIM, IS ENTITLED TO RESTITUTION of only so much as the plaintiff has received upon the execution levied thereunder. *Id.*
12. JUDGMENT PREMATURELY ENTERED, as where the summons has been served but the time allowed by law to plead has not expired, is irregular merely, and not void. *Mitchell v. Aten*, 231.
13. IRREGULAR JUDGMENT CANNOT BE COLLATERALLY ATTACKED, though it may be set aside on motion or by some appropriate appellate proceeding. *Id.*
14. JUDGMENT MAY BE AMENDED NUNC PRO TUNC AFTER LAPSE OF TERM, when the record discloses that the judgment, as amended, would have been entered in the first place but for the inadvertence of the court, or the error or omission of the clerk. *Adams v. Re Qua*, 191.
15. JUDGMENT AGAINST DEFENDANT PERSONALLY MAY BE AMENDED so as to be against him as administrator *de bonis non*, *cum testamento annexo*, etc., where the record shows that the action was against him in his capacity of such administrator. *Id.*
16. COMPLAINT ON FOREIGN JUDGMENT NEED NOT ALLEGE THAT COURT THAT RENDERED IT HAD JURISDICTION either of the cause or the parties. A judgment of a foreign court, complete and regular on its face, is *prima facie* valid. *Gunn v. Peake*, 661.
17. FOREIGN JUDGMENT MAY BE PROVED BY COPY THEREOF, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy. *Id.*
18. GREAT SEAL OF STATE OR GOVERNMENT PROVES ITSELF. JUDGMENT THAT "ACTION BE DISMISSED WITHOUT PREJUDICE to another action" is, by its terms, no bar to a subsequent action for the same cause. And it makes no difference whether the saving clause was properly or improperly attached to the judgment. *Id.*

See ATTACHMENTS, 6; EJECTMENT; EXECUTIONS, 1; FRAUDULENT CONVEYANCES; INSOLVENCY; REPLEVIN.

JUDICIAL SALES.

See ATTACHMENTS; EXECUTIONS; SHERIFFS.

JURISDICTION.

1. SERVICE BY PUBLICATION COMPLETED PRIOR TO DATE OF JUDGMENT gives jurisdiction. *Mitchell v. Aten*, 231.
2. REMEDY AT LAW IS EXCLUSIVE only when the rights of parties spring from legal duties and obligations; and even in those cases, if the legal remedy is inadequate to afford the proper relief, and property is wrongfully withheld to satisfy the just claims of parties, and beyond the reach of the law, equity may be successfully appealed to, and will furnish the necessary assistance in most cases to prevent a failure of justice. *Godfrey v. White*, 537.

JURY AND JURORS.

1. OPINION WHICH DISQUALIFIES JUROR IN CRIMINAL CASE is of that fixed character which repels the presumption of innocence of the accused, who is already condemned in the juror's mind; and such disqualification does not arise because it will require some evidence to remove impressions or opinions formed from rumors, newspaper statements, or other sources. *People v. Barker*, 501.
2. SOURCES OF INFORMATION ARE IMPORTANT IN DETERMINING EFFECT LIKELY TO HAVE BEEN PRODUCED UPON MIND OF JUROR, in a criminal case, and the influence likely to be exerted upon his judgment; but impressions made upon the mind which lead towards certain conclusions, whether reached or not, will always require other impressions to be made to eradicate the former ones, or to lead to different conclusions, or in other words, will require some evidence to remove them. *Id.*
3. QUESTION WHETHER JUROR IN CRIMINAL CASE IS DISQUALIFIED BY REASON OF HIS OPINION MUST BE ALWAYS ONE OF DEGREE; and the trier is called upon to determine whether the opinion entertained is of that fixed or permanent character which disqualifies him from coming to the case in a fair and impartial frame of mind, unaffected with prejudice or favor to either party. *Id.*
4. ACCUSED IS NOT PREJUDICED BY IMPROPER OVERRULING CHALLENGE FOR CAUSE, where he thereupon peremptorily challenges the juror, and accepts a jury without exhausting his peremptory challenges. *Id.*
5. COURT IS INVESTED WITH CERTAIN DEGREE OF DISCRETION IN SELECTION OF JURORS, which is to be exercised by seeing that proper and competent men are selected; and so long as the case of a party is not prejudiced by the exercise of such discretion, he cannot complain. *Id.*
6. COURT MAY EXCLUDE JUROR FROM PANEL OF ITS OWN MOTION, where, during the impaneling, he exhibits such a reckless disregard of his duty as to make it quite evident that he is unfit to serve, by failing to appear in court at the time to which it had adjourned, and remaining in a room of a hotel, where he was found after an hour's search, playing pool. *Id.*
7. COURT MAY ORDER JUROR DISCHARGED AND ANOTHER JUROR DRAWN IN HIS STEAD, where, after the jury had been selected and sworn, and before any further proceedings were had in the case, it was ascertained that such juror was an alien. *Id.*
8. ALIEN IS NOT QUALIFIED IN ANY RESPECT TO SIT UPON JURY, IN MICHIGAN, and a jury selected and sworn, but containing an alien, consists of only eleven jurors. *Id.*
9. JURY TRIAL. — Counsel have no right to read law books, nor to argue questions of law to the jury. *Sullivan v. Royer*, 51.
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10. VERDICT OF JURY IN SUIT IN EQUITY is advisory merely. *Id.*
See INTERPLEADER; PLEADING AND PRACTICE.

LANDLORD AND TENANT.

1. LEASE OF "FIRST FLOOR IN BUILDING" INCLUDES OUTSIDE OF FRONT WALL of that part of the building, with the right to use and enjoy the same as leased premises, in the absense of anything to the contrary in the lease. *Lowell v. Strahan*, 422.
2. LESSEE'S AGREEMENT TO ALLOW THIRD PERSON TO PLACE SIGN UPON OUTSIDE WALL OF LEASED BUILDING, for a certain time, in consideration of an annual payment, creates a license merely, and is therefore not a breach of a covenant not to underlet any part of the premises. *Id.*
3. LANDLORD IS UNDER NO OBLIGATION TO SUBTENANT TO KEEP LEASED PREMISES IN REPAIR, and is therefore not liable in damages for injuries to the property of the subtenant caused by the falling of the building by reason of the defective condition of its walls, where the subletting and occupancy under it was without the knowledge, notice, or assent of the landlord, and in violation of a covenant not to sublet. *Donaldson v. Wilson*, 487.
4. LESSEE TAKES RISK OF QUALITY OF PREMISES HIRED, in the absence of an express or implied warranty, or of deceit, on the part of the lessor, and cannot ordinarily maintain an action against the lessor for injuries sustained by reason of their defective condition; but the lessor is liable if the lessee is injured through concealed and dangerous defects, known to the lessor, and which a careful examination of the premises by the lessee would not discover. *Cowen v. Sunderland*, 469.
5. EVIDENCE SHOULD BE SUBMITTED TO JURY, TO DETERMINE WHETHER LANDLORD KNEW OF DEFECTIVE COVERING OF CESSPOOL, and the danger resulting therefrom, and neglected to inform the tenant thereof, and whether the tenant had failed to make a proper examination of the premises, in an action by a tenant against her landlord for injuries sustained by her from falling into a cesspool in the yard of the premises, where it appeared that the cesspool was never pointed out to the tenant, and that she did not know of its existence, that it was covered by rotten boards, concealed by earth, upon which grass and weeds were growing, and that the landlord had directed the cover to be repaired with old boards some time before, and was present when the repairs were made. *Id.*
6. LANDLORD IS LIABLE FOR INJURIES SUFFERED BY THIRD PERSONS LAWFULLY USING WAY, where he lets premises abutting upon the way, which, from their condition or construction, are dangerous to such persons, unless the tenant has agreed to put the premises in proper repair. *Dalay v. Savage*, 429.
7. TENANT UNDER CROPPING LEASE DEPRIVES HIMSELF OF ALL CLAIM TO CROP which he has planted, where, without fault on the part of the landlord, he repudiates the agreement, and voluntarily abandons the premises. In such case, the crop becomes a part of the land, and goes with it. *Kiplinger v. Green*, 584.
8. DOCTRINE OF EMBLEMENTS DOES NOT APPLY where the term of occupancy of leased premises is certain under the contract, and is not determined by the act of the lessor, nor by any other cause than the violation by the lessee of the agreement under which he holds. *Id.*
9. ASSIGNEES OF LEASE HOLDING UNDIVIDED INTERESTS THEREUNDER in unequal proportions, as tenants in common, are jointly and severally liable

to the lessor for a breach of a covenant to repair or to surrender possession. *Coburn v. Goodall*, 75.

10. LESSOR IRREVOCABLY ELECTS TO TERMINATE LEASE when he brings an action of ejectment against the lessees, or their assignees, to recover the leased premises. Therefore he cannot recover for rent subsequently falling due, though no judgment has been rendered in the action of ejectment. *Id.*

See ESTATES FOR LIFE.

LIENS.

POLICY OF LAW IS AGAINST UPHOLDING SECRET LIENS AND CHARGES to the injury of innocent purchasers and encumbrancers for value. *Palmer v. Howard*, 60.

See ATTACHMENTS; JUDGMENTS; MECHANICS' LIENS; RECEIVERS.

MALICIOUS PROSECUTION.

1. PLAINTIFF CANNOT RECOVER IN ACTION FOR MALICIOUS PROSECUTION OF CIVIL SUIT, unless he produces evidence to prove that the suit was instituted not only maliciously but without probable cause. *Clements v. Odorless Excavating Apparatus Co.*, 409.
2. JUDGMENT OF CIRCUIT COURT OF UNITED STATES, ON PROOFS TAKEN, and after argument by counsel, awarding the complainant an injunction to restrain an alleged infringement of a patent right, ought to be considered conclusive as to the question of probable cause, although the judgment was reversed on appeal to the supreme court. *Id.*

MANDAMUS.

1. WRIT OF MANDAMUS IS NOT REGARDED AS APPROPRIATE REMEDY for the enforcement of contract rights of a private and personal nature, and obligations which rest wholly upon contract, involving no questions of public trust or official duty. And the writ will not ordinarily issue if the applicant has other adequate remedies. *Tobey v. Hakes*, 114.
2. MANDAMUS WILL NOT LIE TO COMPEL SECRETARY OF PRIVATE CORPORATION TO ALLOW the transfer of stock on the books of the corporation. *Id.*

MARRIAGE AND DIVORCE.

1. LAW OF MARRIAGE as administered by the courts is founded on business principles, in which the utmost good faith is exacted, and the least fraud made a subject of judicial cognizance. *Piper v. Hoard*, 789.
2. THAT WOMAN WAS TOO READY TO MARRY FROM MERCENARY MOTIVES will not debar her, nor the child of the marriage, from relief based on fraudulent representations made to her to induce her to contract such marriage. *Id.*
3. UNDER MARRIAGE SETTLEMENTS, ISSUE take their interests as purchasers under both parents. *Id.*
4. EVIDENCE OF SEXUAL INTERCOURSE AND FAMILIARITIES, PRIOR TO MARRIAGE, with person with whom adultery is charged, is admissible, in a libel for divorce on the ground of adultery, to explain the character of ambiguous conduct between the same parties after marriage, which is relied on as evidence of the act of adultery in issue. *Brooks v. Brooks*, 485.

See ESTOPPEL 5; FRAUD 2; PARENT AND CHILD.

MASTER AND SERVANT.

1. **TO ENTITLE SERVANT TO RECOVER FOR INJURY**, he must prove negligence or omission of duty on the part of the master, occasioning the injury. If it was caused by his own neglect and want of ordinary care, or was the result of accident, he cannot recover. In such cases, negligence is never presumed against the master. *Wormell v. Maine Central R. R. Co.*, 321.
2. **RELATION OF MASTER AND SERVANT**, without neglect of duty, does not impose on the master a guaranty of the servant's safety, but that a servant of sufficient age and intelligence to understand the nature of the risks to which he is exposed undertakes, for compensation, the natural, ordinary, and apparent risks and perils incident to the employment. *Id.*
3. **RELATION OF MASTER AND SERVANT** requires each to exercise ordinary and reasonable care; the master to use such care in providing and maintaining suitable means and instrumentalities with which to conduct his business that the servant exercising due care may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment. *Id.*
4. **MASTER IS NOT BOUND TO FURNISH SAFEST MACHINERY**, instrumentalities, and appliances in carrying on his business; nor need he provide the best methods for their operation in order to insure responsibility from their use. But the servant, knowing the circumstances, must judge whether he will enter his service, or, having entered, will remain. *Id.*
5. **PROPRIETORS OF LARGE MANUFACTURING ESTABLISHMENTS ARE BOUND TO FURNISH SUITABLE PLACE** in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment in the business as usually carried on. *Smith v. Peninsular Car Works*, 542.
6. **MASTER MUST NOTIFY SERVANT OF SPECIAL RISKS** in the employment of which the latter is not cognizant, or which are not patent; and on failure of such notice, the servant exercising due care and receiving injury is entitled to recover, when the master knew, or ought to have known, of such risks. *Wormell v. Maine Central R. R. Co.*, 321.
7. **PROPRIETORS OF MANUFACTURING ESTABLISHMENTS SHOULD INFORM SERVANTS OF LATENT RISKS**, which the servants, from ignorance or inexperience, are incapable of understanding and appreciating, or which they would not be likely to know, and of which the proprietors or their foremen are presumed to know and be familiar. *Smith v. Peninsular Car Works*, 542.
8. **PROPRIETORS OF MANUFACTURING ESTABLISHMENTS WILL NOT DISCHARGE THEMSELVES FROM OBLIGATION TOWARDS SERVANTS**, by informing the servants generally that the service engaged in is dangerous, especially where the servants are persons who neither by experience nor education have, or would be likely to have, any knowledge of such facts; but the servants should be informed, not only that the service is dangerous, and of the perils of a particular place, but where extraordinary risks are or may be encountered, if known to the masters, or should be known by them, the servants should be warned of these, their character and extent, so far as possible. *Id.*
9. **EMPLOYER IS NOT RESPONSIBLE TO SERVANT FOR INJURY RECEIVED IN EMPLOYMENT** resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation; but where the danger to be avoided requires a knowledge of sci-

- tific facts, or is the result of well-known chemical combinations among well-educated men, if known to the employer, or should be known by him, the employer will be responsible to the servant for an injury resulting therefrom, if he neglects to notify the servant thereof. *Id.*
10. NEGLIGENCE OR CARELESSNESS ON PART OF WORKMEN IN MANUFACTURING ESTABLISHMENT IS NOT SHOWN, so as to defeat an action brought by one of them against the employer for an injury received in the employment, from the fact that they whistled, sang, laughed, and talked while in the performance of their work. *Id.*
 11. SERVANT CANNOT BE CHARGED WITH CONTRIBUTORY NEGLIGENCE IN CASE OF INJURY RECEIVED IN EMPLOYMENT, or be said to have assumed all the risks and perils, ordinary and extraordinary, incident to the employment, in the absence of evidence showing the proper notice given by the agent in charge, or knowledge on the part of the servant. *Id.*
 12. SERVANT MUST PROVE BY EVIDENCE having legal weight that he was exercising due care at the time the injury was received, to entitle him to recover. *Wormell v. Maine C. R. R. Co.*, 321.
 13. WHERE SERVANT RECEIVES INJURY, QUESTION OF DUE CARE on his part is ordinarily for the jury; but sometimes it becomes one of law, whether, from the facts and circumstances, the jury can properly find in favor of such care. *Id.*
 14. IF SERVANT, AT TIME OF RECEIVING INJURY, was not exercising due care, and was performing dangerous duties outside of his regular employment, he will be held to have assumed the risk incident thereto, and cannot recover, especially when he knew as well as the master the dangerous nature of the service in which he engaged. *Id.*
 15. WHETHER SERVANT ASSUMED RISK OR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE cannot be determined by a trial court as a matter of law, but must be submitted to the jury as a question of fact, in a case where the evidence shows that certain dangerous parts of the machinery in an extensive flour-mill, which had been, to the plaintiff's knowledge, formerly covered, were, at the time of the accident therefrom to him, and had been for several days prior thereto, uncovered for the purpose of making repairs, and that plaintiff had not been notified of the removal of the covering, the character of his duties being such as to reasonably distract his attention from the condition of the gearing on any particular machine, and it not being his duty to look after the repairs, or to keep the machinery in order. *Craver v. Christian*, 675.
 16. SERVANT HAVING EQUAL KNOWLEDGE WITH MASTER of the dangerous character of the work upon which he enters assumes the risks thereof. *Fisk v. Central P. R. R. Co.*, 22.
 17. DUTY OF MASTER TO INFANT OR MAJOR EMPLOYEE is to warn and instruct him regarding the dangers of the employment, and the means of avoiding them. *Id.*
 18. MINOR EMPLOYEE PROPERLY INSTRUCTED CONCERNING DANGERS of his employment thereafter stands on the same plane with other servants, with respect to the risks incident to the employment. *Id.*
 19. BOSS OF TOOL-ROOM WHOM MINOR EMPLOYEE is instructed to obey has not, arising from such instructions, authority to direct such minor to go into other shops of the same master to look for work; and if such minor employee does go to such shop, and is there placed in a dangerous employment, without proper warning or instructions, and while in such employment is injured, he cannot recover therefor from the master. *Id.*

20. MASTER CANNOT EVADE DUTY TO HIS SERVANT BY DELEGATING ITS PERFORMANCE to another. Whoever does the act by the appointment or permission of the master represents, and as to that act is, the master. *Bushby v. New York etc. R. R. Co.*, 843.
21. EMPLOYEE OF RAILROAD MAY ASSUME THAT CAR DELIVERED TO HIM for use is safe, and that the needed requirements for the reception of a load placed upon it are fit for the purpose. *Id.*
22. RAILROAD COMPANY MUST PREPARE ITS CARS, whether freight or passenger, for the use to which they are consigned. *Id.*
23. FOR DEFECTIVE STAKES AT SIDE OF PLATFORM FREIGHT-CAR, RAILROAD COMPANY is answerable to an employee injured thereby, though the use of such defective stakes may be attributed to the negligence of another employee or of a shipper. *Id.*
24. RAILROAD COMPANY DELEGATING TO SHIPPERS DUTY OF SEEING that freight-cars are in good condition and safely loaded is answerable for their negligence to one of its employees injured thereby. *Id.*
25. RAILROAD COMPANY'S DUTY TO ITS EMPLOYEES requires it to use diligence and care, not only in furnishing proper and reasonably safe appliances and machinery, and skillful co-employees, but also in making and promulgating rules, which, if faithfully observed, will give reasonable protection to employees. *Id.*
26. DUTY OF RAILROAD COMPANY TO ITS EMPLOYEES requires it to use such care in providing tracks and bridges that it will be reasonably safe for its employees to discharge the duties they are called on to perform. *St. Louis etc. R. R. Co. v. Irwin*, 266.
27. RAILROAD COMPANY, FOR INJURIES CAUSED BY BRIDGE, the covering of which is so low as to strike an employee in the discharge of his duties, is answerable to him in damages, if he had no knowledge of its dangerous nature. *Id.*
28. EMPLOYEES OF RAILROAD COMPANY SHOULD NOT BE SUBJECTED to unnecessary perils from structures over and along the track which might easily be changed or removed. *Id.*
29. EMPLOYEE OF RAILROAD COMPANY ASSUMES ORDINARY risks incident to the service; and if he enters or continues in such service with a knowledge of danger, and without objection, he must abide the consequence. *Id.*
30. EMPLOYEE OF RAILROAD COMPANY IS NOT REQUIRED TO KNOW ALL DEFECTS AND OBSTRUCTIONS of the road on which he is employed. *Id.*
31. WHETHER CONDUCTOR OF TRAIN USES ORDINARY CARE in standing on a caboose, for the purpose of giving necessary signals, while his train is passing under a bridge, is a mixed question of law and fact. *Id.*
32. EMPLOYEE OF RAILROAD COMPANY DOES NOT ASSUME RISK OF INSUFFICIENCY OF SWITCH-RAIL to support the weight of rolling stock used on the road, where it does not appear that he knew of the defective condition of the switch, the liability of the rail to break, or the special danger from that cause likely to arise from running his engines over it. *Clapp v. Minneapolis and St. Louis R. R. Co.*, 629.
33. MASTER IS NOT ANSWERABLE TO SERVANT for injuries inflicted on him by negligence of another servant in same common employment, and not traceable to personal negligence of master. *Fisk v. Central Pacific R. R. Co.*, 22.
34. SERVANT ASSUMES ORDINARY RISKS of employment, including risk of injury, from neglect of fellow-servants. *Id.*

35. ORDER OF EMPLOYEE DIRECTING MINOR EMPLOYEE to undertake a dangerous task without proper advice as to such danger, if it be negligence, is the negligence of the fellow-servant, for which no recovery can be had against the master. *Id.*
36. MINOR OR INFANT EMPLOYEE CANNOT RECOVER FOR INJURIES caused by negligence of a fellow-servant. *Id.*
37. WHERE NEGLIGENCE OF MASTER, COMBINED WITH THAT OF HIS SERVANT, PRODUCES injury to a fellow-servant, the latter may recover damages of the master. *Id.*
38. TRAIN DISPATCHER WHO HAS CONTROL of the movement of trains and engines, and to whose orders conductors and engineers are subject, is not a fellow-servant with those actually engaged in operating and moving trains, but is the representative of the company. *Smith v. Wabash etc. Ry Co.*, 729.
39. TRAIN DISPATCHER BEING REPRESENTATIVE of the company, the latter is liable for his negligence causing injury to an employee of the company, acting under his orders, whether verbal or written, as required by the rules of the company. *Id.*
40. TRAIN DISPATCHER WHO, AS REPRESENTATIVE OF COMPANY, determines that he cannot give written orders, as required by the rules, but gives verbal orders to meet an emergency, such orders are the act of the company; and if its employee, acting under such orders, is injured through the negligence of the train dispatcher, the company is liable. *Id.*
41. PARTY IS NOT RELIEVED FROM LIABILITY FOR INJURIES RESULTING FROM FALL OF WALL, on the ground that it was constructed by an independent contractor, if the defect in the wall arose from the plans and specifications adopted by such party, and not from negligence of the contractor in carrying out such plans and specifications. *Lancaster v. Connecticut etc. Ins. Co.*, 739.
42. PROVISION IN BUILDING CONTRACT that the work shall be done in a good and workmanlike manner relates to the things specified to be done, and does not impose on the builder the duty of doing acts or taking precautions which ought to have been, but were not, provided for in the plans and specifications. *Id.*

MECHANICS' LIENS.

1. MINNESOTA STATUTE DOES NOT AUTHORIZE MECHANIC'S LIEN FOR FILLING IN AND GRADING EARTH about buildings already erected, where the work does not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land. *Pratt v. Duncan*, 697.
2. ONE WHO FURNISHES MATERIAL FOR BUILDING ERECTED ON VILLAGE LOT, under a contract with parties in possession of the lot, acquires a mechanic's lien on the building and lot, although the title to the lot was, at the date of the contract, in a third person, who conveyed the same, after a part of the material was furnished, to one of the parties to the contract, to whom the other party at the same time transferred his interest. The acquisition of the title united in the party acquiring it the ownership of the house and lot, and the lien rests upon his interest in both, and he is not permitted to defeat it by setting up title in a third person previous to that date. *Colman v. Goodnow*, 632.
3. CLAIM OF LIEN NOT ATTESTED BY SEAL OF OFFICER BEFORE WHOM IT WAS SWORN TO, within the statutory time, is insufficient to preserve the lien. *Id.*

4. **CERTIFICATE FILED UNDER MECHANIC'S LIEN LAW**, which requires the name of the owner or owners of the property, if known, to be stated, is good, if the petitioner, not knowing the name of the owner, sets forth that the land is owned, to the best of his knowledge and belief, by a certain named person. *McPhee v. Litchfield*, 482.

See **HUSBAND AND WIFE**, 1.

MORTGAGES.

1. **MORTGAGES**. — The provisions of the law concerning mortgages cannot be evaded by mere shuffling of words. *Palmer v. Howard*, 60.
2. **INSTRUMENT IS MORTGAGE**, no matter what the parties may characterize it, where it clearly appears therefrom that for all practical purposes the ownership of the property is intended to be transferred and a lien for the purchase price reserved to the seller. *Id.*
3. **INSTRUMENT IS MORTGAGE, AND NOT EXECUTORY CONTRACT OF SALE**, where it recites the loan of certain articles, that if the price set against them is paid they shall belong to the borrower, otherwise to the lender; that notes or drafts given are not to be considered payments till paid; that the borrower agrees to pay the prices named; that the property is not to be removed from a designated lot without the assent of the lender; and that if the borrower fail to meet any of the payments, the lender may take the property and dispose of it, rendering to the borrower all surplus after paying the price agreed upon, etc. *Id.*
4. **SURETY MAY, AFTER MATURITY OF DEBT**, for the payment of which he is responsible, replevy goods mortgaged to secure him as surety, and may foreclose such mortgage, although he has not actually paid such debt. *Bates v. Wiggin*, 234.
5. **ORAL MORTGAGE**. — Verbal agreement by one with his surety that property purchased with money raised by note signed by surety shall become the property of such surety until such note is paid, is, in effect, an oral mortgage. *Id.*
6. **ORAL MORTGAGE OF CHATTELS NOT ACCOMPANIED BY THEIR DELIVERY** is valid as between the parties. *Id.*
7. **PURCHASE-MONEY MORTGAGE, EXECUTED CONTEMPORANEOUSLY WITH DEED OF PURCHASE**, whether to the vendor or to a third person who advanced the purchase-money paid to the vendor, takes precedence over the lien of a prior judgment against the mortgagor. *Stewart v. Smith*, 651.
8. **DEED AND MORTGAGE NEED NOT BE EXECUTED AT SAME MOMENT**, nor even on the same day, to make them contemporaneous, provided they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties. *Id.*
9. **MORTGAGE, CONVEYANCE, AND DEFEASANCE EXECUTED AT SAME TIME**, and as parts of the same transaction, though upon different pieces of paper, constitute in law but one instrument, and that instrument is a mortgage. *Bunker v. Barron*, 282.
10. **MORTGAGOR'S LEGAL TITLE IS NOT DIVESTED** by failure to comply with the conditions of the mortgage, nor by surrender of possession to the mortgagee. *Berlack v. Halle*, 185.
11. **GRANTEE OF MORTGAGOR IS NECESSARY PARTY** to foreclosure of a mortgage. A decree to which he is not a party is inoperative as against him, and a purchaser thereunder cannot recover in ejectment against such grantee or his assigns. *Id.*

12. **ORDINARY MORTGAGE IS NOT EVIDENCE OF RIGHT OF POSSESSION** in the mortgage. *Id.*
 13. **MORTGAGE IS DISCHARGED ONLY BY PAYMENT OR RELEASE**, and not by a change in or renewal of the note or debt which the mortgage was given to secure. *Bunker v. Barron*, 282.
 14. **RELEASE BY MORTGAGEE OF MORTGAGE WHICH HE HOLDS IN TRUST FOR ANOTHER**, before it becomes due, is in contravention of his trust, and constitutes no obstacle to enforcing such mortgage against subsequent *bona fide* purchasers. They are bound to know that he had no authority to grant such release. *McPherson v. Rollins*, 826.
- See AGENCY, 2; DEEDS, 13; FIXTURES; FRAUDULENT CONVEYANCES, 1; HOMESTEADS, 23, 24; TAXATION.**

MUNICIPAL CORPORATIONS.

1. **PROVISION IN CITY CHARTER THAT "COMMON COUNCIL SHALL BE JUDGE OF ELECTION AND QUALIFICATIONS OF ITS OWN MEMBERS, and shall have the power to determine contested elections,"** is conclusive, and not subject to review. *People v. Harshaw*, 498.
2. **MAYOR OF CITY IS MEMBER OF COUNCIL**, within the meaning of a provision in its charter that "the common council shall be the judge of the election and qualifications of its own members, and shall have the power to determine contested elections," when the charter also provides that "the mayor, recorder, and aldermen, when assembled together and organized, shall constitute the common council of the city." *Id.*
3. **LEGISLATURE HAS POWER TO LEAVE CITIES TO DETERMINE TITLE OF THEIR OWN OFFICERS** without further review; for the remedy by information, as well as by *quo warranto*, is not a matter of right, but of discretion, and may be withheld by the legislature. *Id.*
4. **TOWN IS NOT LIABLE FOR NUISANCE** when the acts complained of are not within the scope of its corporate powers, nor performed by its officers in the execution of any corporate duty imposed upon them. *Seele v. Inhabitants of Deering*, 314.
5. **TOWN INDEPENDENT OF STATUTE HAS NO CORPORATE POWER** to dig ditches across another's land. Such act is *ultra vires*, and no liability is created on the part of the town when such acts are authorized and directed by a majority of the corporate officers. *Id.*
6. **CITY IS LIABLE FOR COLLECTING AND GATHERING UP SURFACE WATER** by artificial means, such as sewers and drains, and casting it upon the premises of another in increased and injurious quantities. *Pye v. City of Mankato*, 671.
7. **WHEN LAND HAS BEEN LAWFULLY TAKEN FOR STREET**, legislative and municipal authority may authorize the construction and operation of a street railway upon it, no matter what the motor, without providing for additional compensation to the land-owner. *Briggs v. Lewiston etc. R. R. Co.*, 316.

NAMES.

- OMISSION OF INITIAL LETTER OF DEFENDANT'S MIDDLE NAME** in proceedings against him in a justice's court is immaterial. *Allison v. Thomas*, 89.

NEGLIGENCE.

1. **LEGISLATURE MAY DEPART FROM COMMON-LAW PRINCIPLE**, that for a lawful, reasonable, and careful use of property the owner cannot be made

- liable, where protection to persons or property may require such departure. *Gressell v. Housatonic R. R. Co.*, 138.
2. CONSTITUTIONAL LAW. — One using extrahazardous materials or instrumentalities may be made to bear the risk and pay the loss thereby occasioned to the property of another, if there is no fault on the part of the latter, even though negligence on the part of the former cannot be proved. *Id.*
 3. OWNER OF LANDS IS LIABLE IN DAMAGES TO ONE WHO, USING DUE CARE, COMES THEREON, at the invitation or inducement, express or implied, of such owner, on any business to be transacted with or permitted by him, for injuries occasioned by the unsafe condition of the premises, known to him, and suffered negligently to exist, and of which the injured party has no knowledge. *Donaldson v. Wilson*, 487.
 4. INSTANTANEOUS DEATH AND ABSENCE OF CONSCIOUS SUFFERING AFTER FATAL INJURY ARE DISTINCT, and therefore a ruling that there was no evidence of conscious suffering by the intestate, and consequently that the plaintiff was only entitled to recover nominal damages, is correct, and not inconsistent with a ruling that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative, where, in an action by an administratrix to recover damages sustained by the intestate in his lifetime by the breaking of a machine upon which he was employed by the defendant, it appeared that the intestate was found about ten minutes after the accident, with his body crushed and his bowels disrupted, and that, although breathing, he was unconscious, and died almost immediately in that state. *Mulchahey v. Washburn Car Wheel Co.*, 458.
 5. PARENTS OR BROTHER OF CHILD CANNOT BE SAID TO HAVE BEEN NEGLIGENT AS MATTER OF LAW, in an action against a town to recover damages for the death of the child caused by a defect in a street, where the child, one year and ten months old, was sent by his mother into the street for air and exercise, in charge of his brother eight years old, who was accustomed to take him out, and while the children were standing in the street watching other boys at play, the younger child, unnoticed by the elder, started across the street, and upon being seen, called at, and run after by the elder, ran, fell, and rolled into a gutter, which had been filled with water for some time by reason of an obstructed culvert, the condition of which was known to the parents and the elder brother, receiving injuries which caused his death. *Bliss v. Inhabitants of South Hadley*, 441.
 6. CHILDREN SENT INTO STREET BY PARENTS FOR AIR AND EXERCISE MAY BE PROPERLY FOUND TO BE TRAVELERS by the jury, in an action against a town to recover damages for the death of one of them caused by a defect in the street, although they stopped for a few minutes to watch other boys at play. *Id.*
 7. OWNER OF SAW-MILL IS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, defeating his right to recover for loss by fire from the locomotive-engine of a private railroad which had been constructed after the mill was built, from the fact that he allowed combustible material to accumulate around the mill, in near proximity to the railroad; but he had the right to use such material to fill up the waste and low places about the mill, just as he was accustomed to do before the railroad was built, and was not obliged to guard his premises to relieve the owner of the railroad from liability for his negligent acts. *Kendrick v. Towle*, 526.

8. SLIGHT CONTRIBUTORY NEGLIGENCE not clearly shown to have contributed to plaintiff's injury will not defeat his recovery when the employees of the defendant were grossly negligent. *Wichita etc. R. R. Co. v. Davis*, 275.
 9. FACT THAT ACT OF THIRD PERSON MAY HAVE CONTRIBUTED to the final catastrophe will not exonerate a defendant sued for injuries resulting from an act which is unlawful, or is so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons. *Barry v. Terkildsen*, 55.
- See AGENCY, 1; INNKEEPERS; MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

1. PRESUMPTION FROM DELIVERY TO ANOTHER OF ORDER ON THIRD PERSON for the payment of money to the person to whom the order is given, is, that the drawee is indebted to the drawer in the sum mentioned in the order. *Manchester v. Braedner*, 828.
2. POSSESSION OF NOTE BY PAYEE IS PRIMA FACIE EVIDENCE THAT IT HAD BEEN DELIVERED, but the fact may be shown to be otherwise by parol evidence. Such evidence does not contradict the note, or seek to vary its terms, but merely goes to the point of its non-delivery. *McFarland v. Sikes*, 111.
3. PAROL EVIDENCE IS ADMISSIBLE, IN ACTION ON PROMISSORY NOTE, to show that it was delivered by the defendant to the plaintiff on condition that it should be returned to the defendant on a certain day, if demanded, and that it was so demanded, but the plaintiff refused to surrender it. *Id.*
4. BONA FIDE HOLDER FOR VALUE OF BILL OF EXCHANGE BEFORE ACCEPTANCE MAY ENFORCE IT against a subsequent acceptor, although no new consideration moves from him to the drawee. The rights of the holder of a bill of exchange are the same, whether they were acquired in anticipation of or subsequent to the acceptance. *Credit Co. v. Howe Machine Co.*, 123.
5. ACCEPTOR MAY PAY NON-NEGOTIABLE DRAFT TO PAYEE without delivery of the draft, if acceptor has not been notified of transfer of the draft, and such payment is a good defense to an action by any such transferee against the acceptor. *Johnston v. Allen*, 180.
6. BURDEN OF PROOF OF NOTICE of transfer of non-negotiable draft before its payment lies on the plaintiff. *Id.*
7. PAYMENT OF NON-NEGOTIABLE DRAFT AFTER NOTICE that the payee had parted with the possession thereof, either by transferring it absolutely or as collateral security, is not a good defense. *Id.*
8. ONE WHO HAS DELIVERED DRAFT AS COLLATERAL SECURITY has no right subsequently to forbid or to attach any conditions to its payment. *Id.*
9. CONSIDERATION OF TRANSFER OF DRAFT IS NOT PROPER SUBJECT OF INQUIRY in an action by the transferee against the acceptor. *Id.*
10. IN CASE OF PROTEST OF NOTE, COMMERCIAL USAGE ONLY REQUIRES NOTICE TO BE GIVEN TO IMMEDIATE INDORSER, by the indorsee making demand of payment. It is not necessary for the notary to take any notice of the residence of the maker being upon the note, or to make any inquiry as to the residence of any of the indorsers, except the last. Such a rule would greatly embarrass and obstruct business, and is not required by the authorities. *Wood v. Callaghan*, 597.
11. NOTICE OF DISHONOR OF NOTE is sufficient if addressed to the indorsers at their former place of business, where their affairs were being settled.

- by a trustee to whom they had assigned for the benefit of their creditors. *Casco National Bank v. Shaw*, 319.
12. NOTICE OF DISHONOR OF NOTE IS PROPERLY MAILED if dropped into a street letter-box put up by the post-office department. It is as truly mailed as if deposited in a letter-box within the post-office building. *Id.*
 13. IN ACTION BY HOLDER AGAINST INDORSER OF NOTE, the latter is not entitled to the benefit of payments made by a third party under an agreement with the holder that the note should be assigned to him. The money so paid is not a payment on the note. *Id.*
 14. COMPOUNDING FELONY. — The assignment of a draft is valid and enforceable against its acceptor, though such assignment may have been made to compound a felony. *Johanson v. Allen*, 180.
 15. AGREEMENT BY HOLDER OF SINGLE BILL TO RELINQUISH CLAIM TO INTEREST which had accrued thereon, and to accept the payment of the principal in full satisfaction of the debt, is without consideration, and the debt is not discharged. *Emmitsburg R. R. Co. v. Donoghue*, 396.
 16. IN ACTION TO RECOVER INTEREST DUE ON SINGLE BILL, plea that defendant owed plaintiff the single bill and another debt, the amount of which was in dispute, and that in performance of an agreement with the plaintiff the defendant paid the face of the bill, and also the amount of the other debt as claimed by the plaintiff, without further dispute or delay, and that these payments were accepted by the plaintiff in full settlement of his claims, is not a sufficient defense to the action. *Id.*
 17. PARTIAL PAYMENT BY GUARANTOR OF NOTE DOES NOT DISCHARGE MAKER PRO TANTO, if such payment be made upon the agreement that the payee shall hold the note as security to the guarantor for the amount paid, as well as for the balance remaining due the payee. *Granite Nat. Bank v. Fitch*, 484.
 18. NEW NOTE FOR BALANCE DUE ON ORIGINAL ONE IS NOT TO BE TREATED AS PAYMENT THEREOF, when the new note was sent by the makers to the holder of the original, but was never discounted or paid, or accepted in discharge of the original. *Id.*

See CORPORATIONS, 2-5; PAYMENT.

NEW TRIAL.

FACT THAT TESTIMONY OF WITNESS DIFFERS IN SOME IMPORTANT PARTICULARS from that given by him on a former trial of the case is not sufficient to justify the appellate court in setting aside a verdict resting upon such testimony, which the trial court has refused to disturb. *Smith v. Wilson*, 662.

NOTICE.

1. ACTUAL NOTICE MAY BE EITHER EXPRESS OR IMPLIED. *Knapp v. Bailey*, 295.
2. IMPLIED NOTICE IS IMPUTED TO PARTY shown to be conscious of having means of knowledge which he does not use, as where he chooses to remain voluntarily ignorant, or is grossly negligent in not pursuing inquiries suggested by known facts. *Id.*
3. ACTUAL NOTICE MAY BE PROVED BY DIRECT EVIDENCE, or inferred from circumstances. *Id.*
4. ONE IS CHARGEABLE WITH ACTUAL NOTICE OF FACTS, if he has knowledge of such facts as would lead a fair and prudent man to make further inquiries, and if such inquiries, if pursued with ordinary diligence, would

have given him knowledge of the facts, with notice of which he is sought to be charged. *Id.*

See AGENCY, 3; BONA FIDE PURCHASERS; EXERCUTIONS; NEGOTIABLE INSTRUMENTS.

NUISANCE.

1. NUISANCE. — The issuing of soot from a smoke-stack may be enjoined, where it constitutes a disagreeable nuisance in a populous city. *Sullivan v. Royer*, 51.
2. LICENSE TO MAINTAIN NUISANCE, if granted by a board of supervisors, will not be permitted to substantially impair the rights of property holders. *Id.*
3. NUISANCE. — Purchaser of reversionary interest in real estate upon which a nuisance exists, and of which he has full knowledge, and who thereafter receives the rents thereof from the tenant in possession, is answerable for damages arising from such nuisance subsequent to his purchase. *Pierce v. German etc. Savings Society*, 45.
4. ABATEMENT OF NUISANCE is accomplished in equity by an injunction, adapted to the facts of the case. *Sullivan v. Royer*, 51.
5. PRAYER OF COMPLAINT for the abatement of a nuisance warrants a decree for an injunction against the continuance of such nuisance. *Id.*
6. FACT THAT ACT OF THIRD PERSON MAY HAVE CONTRIBUTED to the final catastrophe will not exonerate a defendant sued for injuries resulting from an act which is unlawful, or is so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons. *Barry v. Terhildsen*, 55.

See HIGHWAYS; MUNICIPAL CORPORATIONS.

OFFICE AND OFFICERS.

MAGISTRATE IS JUDICIAL OFFICER having summary jurisdiction in matters of criminal or quasi criminal nature. Justices of the peace, police justices, and American consuls in foreign ports are magistrates. *Kwás v. State*, 173.

OLEOMARGARINE.

See CONSTITUTIONAL LAW, 14.

PARENT AND CHILD.

1. AFTER DIVORCE A VINCULO DECREED WIFE for husband's "desertion and failure to support," without provision for alimony or custody of children, the husband is still liable for the necessary support of the children of the marriage during their minority. *Gilley v. Gilley*, 307.
2. DURING HIS LIFETIME FATHER IS ENTITLED to the services and earnings, and liable for the support of his minor children, independent of statute or decree; but during such period the wife is not entitled to the services of, nor is she bound to support, such children. *Id.*
3. DECREE OF DIVORCE, WITHOUT PROVISION FOR CUSTODY OF CHILDREN of the marriage, does not affect the parental relation between the parties and their children. The husband is still liable for their support during minority. *Id.*

See MARRIAGE AND DIVORCE; WILLS, 7.

PARTITION.

1. COURTS OF EQUITY HAVE EXCLUSIVE JURISDICTION OF SUITS FOR PARTITION OF PERSONAL PROPERTY, even though the complainant's title is denied by the defendant. *Godfrey v. White*, 537.
2. ACCOUNTING IS PREREQUISITE TO SUIT FOR PARTITION OF PERSONAL PROPERTY only where a partnership relation exists between the parties as to the property sought to be partitioned, or there is some agreement, express or implied, between them that an accounting shall be had before such division. *Id.*

PARTNERSHIP.

IN SUIT ON CONTRACT WITH PARTNERSHIP, IT MUST APPEAR THAT ALL WHO SUE WERE PARTNERS at the time of making the contract. One who has been subsequently admitted as a partner cannot join in the action, although it was agreed, as between the partners themselves, that he should become equally interested with the others in all the existing property and rights of the firm, unless there has been, after the accession of the incoming partner, a new and binding promise to pay to the firm as newly constituted. And this principle applies with great strictness where the contract is by specialty. *Firemen's Ins. Co. v. Floss*, 398.

See EVIDENCE, 7; EXEMPTIONS, 2, 3, 4; INFANCY; STATUTE OF FRAUDS.

PAYMENT.

1. PAYMENT IS PRESUMED PRIMA FACIE from the giving of a negotiable note for a simple contract debt. This presumption may be rebutted by any competent evidence showing that the intention of the parties was not to treat such note as a payment. *Bunker v. Barron*, 282.
2. PAYMENT IS NOT PRESUMED from taking a negotiable note for an antecedent debt, when such debt is secured by a mortgage or other security. *Id.*
3. HOLDER OF SEVERAL UNPAID NOTES, SOME SECURED AND OTHERS UNSECURED, MAY, IN ABSENCE OF ANY AGREEMENT or direction as to the application of payment, apply the money exclusively to the payment of any one of the notes, and is not bound to a *pro rata* application of it. *Wood v. Callaghan*, 597.

See NEGOTIABLE INSTRUMENTS, 15-18.

PENSIONS.

1. CHARGE BEYOND TEN DOLLARS FOR SERVICES IN OBTAINING PENSION IS, UNDER LAWS OF UNITED STATES, AGAINST PUBLIC POLICY, and cannot be sustained; and the money taken beyond the amount allowed for such services may be recovered back by the pensioner as money received for his use. *Hall v. Kimmer*, 575.
2. FEDERAL STATUTE LIMITING FEE RECOVERABLE FOR OBTAINING PENSION IS INTENDED for protection of the soldier and his family from unreasonable and unjust exactions on the part of agents who assume to act in his interest in collecting his pension, and should be applied by the courts, when invoked, in such a manner as to afford the protection intended. *Id.*

PHYSICIANS.

IT IS NOT COMPETENT TO ALLOW JURY TO DETERMINE FOR ITSELF whether physician's course has been proper or improper in the treatment of a

fractured limb; and it is not error to refuse the jury permission to inspect the limb for that purpose. *Carstens v. Hanselman*, 606.

PLEADING AND PRACTICE.

1. **TO DETERMINE WHETHER ONE IS PARTY IN REPRESENTATIVE CAPACITY**, the averments and scope of the complaint must be considered. *Adams v. Re Qua*, 191.
2. **SAME CAUSE OF ACTION MAY BE STATED IN DIFFERENT COUNTS**; in which case, there need be but one finding or verdict. A nominal verdict for plaintiff on one count, and a substantial verdict for him on the other, shows that the jurors intended to award damages under the latter only; and the judgment cannot be arrested on the ground that there are two verdicts for the same cause of action. *Lancaster v. Connecticut Mutual Life Ins. Co.*, 739.
3. **WHERE BAD PLEA IS FILED, WITHOUT NOTICE TO PLAINTIFF OF ITS FILING, BETTER PRACTICE IS** to move to strike it from the files; but the service of process being good, the action of the plaintiff in proceeding to judgment without noticing the plea is a mere irregularity, harmless to the defendant, and does not affect the jurisdiction of the court. *Shickle etc. Iron Co. v. Construction Co.*, 571.
4. **FORTHWITH, WHEN APPLIED TO PERFORMANCE OF ACT**, signifies as soon as, by reasonable exertion, it may be performed. It also sometimes means within a reasonable time, or with all reasonable dispatch; and when a defendant is directed to plead forthwith, he must plead within twenty-four hours. *Anderson v. Goff*, 34.
5. **CONTINUANCE OF PUBLICATION OF SUMMONS** beyond the time required by the order of the court does not extend the time in which defendant is required to answer. *Id.*
6. **EQUITABLE PLEA IN COMMON-LAW ACTION**, disclosing only facts which would constitute a defense at common law, will be stricken out on motion. *Johnston v. Allen*, 180.
7. **REQUEST BY DEFENDANT TO CONTINUE ACTION** until the termination of insolvency proceedings against him is discretionary with the court, and cannot be claimed as matter of right. It will only be granted when justice will thereby be promoted. *Casco National Bank v. Shaw*, 319.
8. **ERROR CANNOT BE ASSIGNED FOR REFUSAL TO GIVE REQUEST TO CHARGE**, where, although it was not given in the language used, it was given in substance. *Kendrick v. Towle*, 526.
9. **INSTRUCTIONS NOT SUFFICIENTLY DEFINITE, AND CALCULATED TO MISLEAD JURY**, ought not to be given. *Baltimore etc. R. R. Co. v. Boyd*, 362.
10. **JUDGE OF TRIAL COURT SHOULD INTERPOSE TO RESTRAIN EVERYTHING TENDING TO MISLEAD JURY**, and divert their minds from the strict line of inquiry with which they are charged. *Id.*
11. **COUNSEL SHOULD NEVER BE PERMITTED TO ARGUE TO JURY AGAINST INSTRUCTIONS** of the court, nor to indulge in any line of argument or comment tending to induce them to disregard the instructions given for their government. *Id.*
12. **IF INSTRUCTIONS TO JURY ARE AMBIGUOUS, AND COURT'S ATTENTION IS CALLED TO FACT**, it is its duty, at any stage of the trial before the jury have acted upon them, to remove the ambiguity, and make the meaning of the court plain. *Id.*

entitled to a reasonable, but a substantial, compensation for such use, to be measured by what would be a fair rental value for the ground so occupied during the time covered by the action, although he offers no evidence whatever of any special damages sustained by him, or that he was hindered or obstructed in any proposed use of his land by reason of the presence and use of the railroad tracks. *Baltimore etc. R. R. Co. v. Boyd*, 362.

2. EVIDENCE IS SUFFICIENT TO SUSTAIN FINDING OF NEGLIGENCE ON PART OF RAILROAD COMPANY which tends to show that at the time of the accident by which plaintiff's intestate, while crossing a street in a sleigh, was run into and killed, a train composed of box-cars was running backwards at a higher rate of speed than allowed by the city ordinance; that it was after dark in the evening; that the street was in use as one of the thoroughfares of the city; that there was at the time no watchman or flag-man at the crossing; and that the driver of the sleigh saw or heard no signal, and had no notice of the approach of the train in time to escape. *Bolinger v. St. Paul etc. R. R. Co.*, 680.
3. IT IS FOR JURY TO DETERMINE WHETHER SPEED OF RAILWAY TRAIN WAS REASONABLE, and the management thereof otherwise reasonably prudent, at a street-crossing in a city, when the situation at the crossing, the manner of running the train, the number and duties of the employees in charge, the rate of speed, the extent of travel on the street, and the opportunity for observation, are shown. *Id.*
4. WHETHER PRESENCE OF WATCHMAN OR OTHER PRECAUTIONS NOT TAKEN WERE NECESSARY for the safety of the public is a question to be determined by the jury, in case of a railway accident occurring at a crossing on a public thoroughfare in a city. *Id.*
5. WHERE EVIDENCE IS OFFERED TO SHOW THAT PRECAUTIONS WERE TAKEN BY DECEASED and those with him, at the time of the happening of a railway accident at a public crossing in a city, it is for the jury to determine whether or not such precautions were reasonably sufficient. *Id.*
6. CROSSING RAILROAD. — To entitle one to recover for injuries sustained while going over a railroad crossing he must, before attempting to cross, use reasonable and ordinary care to determine whether a train is approaching, and if he neglects so to do, he crosses at his peril. *Wickham etc. R. R. Co. v. Davis*, 275.
7. NEGLIGENCE. — Where the undisputed facts show that no precaution has been taken to ascertain and avoid dangers by one injured at a railroad crossing, it then becomes a question of law for the courts. *Id.*
8. WHERE THERE IS CONFLICT OF TESTIMONY AS TO DEGREE of care used by one who is injured in crossing a railroad, it is then a question for the jury. *Id.*
9. FAILURE TO RING BELL OR BLOW WHISTLE OF LOCOMOTIVE AT PRIVATE CROSSING in the open country, guarded by gates on either side, where there is no station for passengers or freight, nor any side-track, and where no trains ever stopped; where for more than twenty years no whistle had ever been sounded, nor whistling-post put up, nor any request therefor made by the owners of the property entitled to use the crossing; and where the line of the railroad on either side is nearly straight, — is not evidence of negligence on the part of the railroad company to go to the jury. *Philadelphia etc. R. R. Co v. Frank*, 390.
10. STATUTE MAKING RAILROAD COMPANIES LIABLE IN DAMAGES FOR INJURY DONE TO "BUILDING OR OTHER PROPERTY," by a fire communicated by

their locomotives, without contributory negligence on the part of the owner of the property, and which gives the railroad company an insurable interest in the property liable to be injured, is not unconstitutional and invalid, either as denying to such companies the equal protection of the laws, or as taking away their property without due process of law, or as impairing their rights under their charters to use fire, steam, and locomotive-engines. Such statute is valid, even in its application to pre-existing railroad companies. *Grissell v. Housatonic R. R. Co.*, 138.

11. EXPRESSION "BUILDING OR OTHER PROPERTY," USED IN CONNECTICUT STATUTE, MAKING RAILROAD COMPANIES LIABLE for fires caused by their locomotives, without contributory negligence on the part of the owner of the property, includes fences, growing trees, and herbage. The provision in the statute, giving the railroad company an insurable interest in the property liable to be injured, does not limit the liability of the company for injury to property such as is ordinarily regarded as insurable. *Grissell v. Housatonic R. R. Co.*, 138.
12. ONE WHO OPERATES PRIVATE RAILROAD WITH LOCOMOTIVE-ENGINE TAKES UPON HIMSELF LARGE RESPONSIBILITIES to prevent loss by fire therefrom, and is required to use an amount of care and caution commensurate with and in proportion to the risks assumed. *Kendrick v. Towle*, 526.
13. RAILROAD CORPORATION IS NOT LIABLE FOR GOODS DESTROYED BY FIRE while in its possession under a contract of carriage, under the Massachusetts Public Statutes, chapter 112, section 214, which provides that a railroad corporation shall be responsible in damages to a person whose buildings or other property may be injured by fire communicated by its locomotive-engines. *Bassett v. Connecticut River Railroad Co.*, 443.
14. IN ACTION FOR DEATH FROM ACCIDENT CAUSED BY BROKEN SWITCH-RAIL, EVIDENCE OF SIMILAR ACCIDENTS at the same switch while the rail was in substantially the same condition is admissible. *Clapp v. Minneapolis and St. Louis R. R. Co.*, 829.
15. THOUGH IT IS ERROR TO LEAVE CONSTRUCTION OF WRITTEN RULES and regulations of railroad company for the jury, still such error will not be noticed when made in favor of the party excepting. *Smith v. Wabash etc. R'y Co.*, 729.
16. IN ACTION AGAINST RAILROAD COMPANY for damages sustained through its negligence, the jury should be instructed to take into consideration all the circumstances, and what are aggravating and what are mitigating should be pointed out; but a failure in this respect is not error when there are no mitigating circumstances in the case. *Id.*
17. ROAD-MASTER AND CONDUCTOR OF RAILROAD COMPANY HAVE NO AUTHORITY TO EMPLOY SURGEON to treat an injured-employee of such company. *Peninsular Railroad Company v. Gary*, 194.

See COMMON CARRIER; MASTER AND SERVANT.

RAPE

See CRIMINAL LAW, 16, 17.

REALTY.

COURTS CANNOT LIMIT EXTENT, UP OR DOWN, TO WHICH ONE MAY ENJOY HIS PROPERTY, and if he goes higher than his neighbor, without inter-

fering with the rights of others or injuring his neighbor, he subjects himself to no liability. *Detroit Base-ball Club v. Deppert*, 566.

RECEIVERS.

RECEIVER TAKES PROPERTY SUBJECT TO EXISTING EQUITIES AND LIENS.
Bates v. Wiggin, 234.

RECORDS.

1. RECORD CAN BE AMENDED ONLY BY MATTERS OF RECORD. *Adams v. Re Qua*, 191.
2. CLERK OR PROTHONOTARY OF COURT IS PRESUMED TO HAVE AUTHORITY TO MAKE AND CERTIFY COPIES of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature and the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. *Gunn v. Peakes*, 661.

REGISTRATION.

1. VOID INSTRUMENTS CANNOT BE RECORDED legally. *Stone v. French*, 237.
 2. PRIORITY IN RECORDING CONVEYANCES OF REAL ESTATE protects only innocent and *bona fide* purchasers and holders. *Mitchell v. Aten*, 231.
 3. PURCHASERS OF LAND MUST BE DEEMED TO HAVE EXAMINED every deed and instrument on record affecting their title, and to have notice of every fact disclosed by the record, and every other fact which an inquiry suggested by these records would have led up to. *McPherson v. Rollins*, 826.
- See DEEDS.

RELEASE.

RECEIPT UNDER SEAL, GIVEN BY OBLIGEE TO JOINT OBLIGOR "in full satisfaction for his liability" upon the obligation, releases the co-obligors, if the receipt itself does not show a contrary intention. *Hale v. Spaulding*, 475.

REPLEVIN.

1. REPLEVIN, PROOF OF OWNERSHIP OF PROPERTY. — A replevin suit was discontinued by the plaintiff, the defendant took judgment for a return of the property, and issued an execution, which was returned unsatisfied. In a suit on the replevin bond for failure to return, *held*, that the defendants were entitled to show that the principal defendant (plaintiff in the replevin suit), was the owner of the property at the time it was replevied, and was still such owner. *Pearl v. Garlock*, 603.
2. WHERE JUDGMENT IN REPLEVIN HAS BEEN RENDERED ON WAIVER OF RETURN for the value of the property, all proper questions must be litigated on the assessment of damages, and are not afterwards open. *Id.*
3. REPLEVIN IS POSSESSORY ACTION, and does not necessarily determine title. It may fail either because the plaintiff shows no right of possession, or because the defendant is shown not to have wrongfully withheld; and it may fail for lack of demand in some cases, as well as for lack of substantial right. *Id.*
4. JUDGMENT IN REPLEVIN, WHERE THERE IS NO ASSESSMENT OF DAMAGES, MERELY DETERMINES the right of possession at the time, and is not inconsistent with the right of the party defeated to recover it back afterwards under a change of circumstances. *Id.*

5. **DEFENDANT IN REPLEVIN SHOULD, UPON REPLEVIN BOND, RECOVER NO MORE** than his legal damages, which depend upon the nature of his right to the property, or the character in which he held it. If he had merely a possessory or partial interest in the property, and was in no position to hold the entire interest for some one else, then he should not recover the full value. *Id.*

See HUSBAND AND WIFE, 5.

RES ADJUDICATA.

See EXTRADITION, 6.

RESTRAINT OF TRADE.

See CONTRACTS, 8.

SALES.

1. **WARRANTY TO WHICH ORDER FOR CHATTEL REFERS AND RESERVES FULL BENEFIT MUST BE OF SUCH LEGAL VALIDITY** as to support an action thereon by the vendee in case of a breach thereof, to enable the vendor to maintain an action on the order. *Grieb v. Cole*, 533.
2. **WARRANTY IS NOT INVALID FOR INCOMPLETENESS**, where the blanks in it for the date, name of the vendee, and subject-matter are not filled out, but it is printed on the back of an order for the chattel, which contains these terms, and which refers to the warranty, thereby constituting the order and warranty one instrument. *Id.*
3. **WARRANTOR IS BOUND BY PRINTED SIGNATURE**, which he adopts as his, as fully as if it were in his handwriting. *Id.*
4. **ARTICLE DELIVERED MAY BE SHOWN NOT TO HAVE BEEN ARTICLE PURCHASED**, under the general issue, in an action to recover the purchase price. *Id.*
5. **ORDER FOR MACHINE FROM DEALER IMPLIES THAT IT SHALL BE NEW**, not second-hand, or the worse for wear; and the dealer cannot impose upon the purchaser a second-hand and worn machine, whether it complies with the terms of his warranty or not as to being good and well made, and that it will do as good work as any other machine of its class. *Id.*
6. **UNDER EXECUTORY CONTRACT OF SALE RESERVING TITLE UNTIL PAYMENT** is made, a *bona fide* purchaser from the vendee acquires no valid claim to the property. *Palmer v. Howard*, 60.
7. **WARRANTY THAT HOGS ARE FIT FOR FOOD IS NOT IMPLIED**, where farmers who are not dealers in provisions kill hogs and sell them, knowing that the purchasers intend them for domestic use. *Giroux v. Stedman*, 472.
8. **RIGHT OF STOPPAGE IN TRANSITU** is favored by the law. *Tufts v. Sylvester*, 303.
9. **INSOLVENT VENDEE MAY REFUSE TO TAKE POSSESSION** and thus leave unimpaired the right of stoppage *in transitu*. *Id.*
10. **GOOD STOPPAGE IN TRANSITU IS EFFECTED** when an insolvent purchaser gives notice of his inability to pay to the vendor, and leaves the goods when they arrive in the possession of some person for the vendor, the latter expressly or tacitly assenting. *Id.*
11. **RIGHT OF STOPPAGE IN TRANSITU** may be effected by demand upon the carrier and an insolvency messenger, when the vendee becoming insolvent has countermanded the order of purchase and refused to receive the

- goods, and his messenger in insolvency, before an assignee is appointed, has accepted the goods from the carrier and paid the charges thereon. *Id.*
12. MESSENGER APPOINTED FOR INSOLVENT VENDOR cannot receive goods so as to terminate the right of stoppage *in transitu*. He acts in a passive capacity merely as custodian, until an assignee is appointed, and has no more authority *ex officio* than a carrier or middleman. Therefore while the goods are in his hands the right of stoppage may be exercised. *Id.*
- See GAMING; MORTGAGES, 1-3.

SEAMEN.

See SHIPPING.

SET-OFF.

See COUNTERCLAIM.

SEWERS.

See MUNICIPAL CORPORATIONS.

SHERIFFS.

SALE BY SHERIFF OF PROPERTY LEVIED UPON IN WHICH EXEMPTION IS CLAIMED, MADE IN VIOLATION OF CLAIMANT'S STATUTORY RIGHTS, is a conversion, respecting which he may be regarded as a tort-feasor from the beginning, and he may be regarded as having received goods contrary to the provisions of the statute exempting property from sale on execution. *McCoy v. Brennan*, 589.

See EXECUTIONS; PROCESS, 2.

SHIPPING.

1. SICK OR INJURED SEAMEN ARE ENTITLED TO BE CARED FOR AND CURED at the expense of the ship, and not to be turned adrift in strange lands without adequate provision. *Scarff v. Metcalf*, 807.
2. OWNERS OF SHIP ARE ANSWERABLE FOR NEGLIGENCE OF MASTER in rendering care or medical aid to sick or injured seamen. *Id.*
3. NEGLIGENCE OF MASTER OF VESSEL, whereby the mate was not properly cared for while injured, is not the neglect of a fellow-servant. *Id.*
4. COST OF NURSING AND MEDICAL ATTENDANCE FOR SICK OR DISABLED SEAMAN FALLS UPON SHIP, although he may have been removed to his own house. *Id.*
5. DAMAGES FOR INJURIES TO SICK OR INJURED SEAMAN, resulting from neglect of owners of ship, or of the master, as their representative, may be recovered by proceedings *in rem* against the vessel, or by action against the owner. *Id.*
6. OWNERS OF VESSEL ARE NOT RELIEVED FROM LIABILITY FOR NEGLIGENCE TO SICK OR INJURED SEAMAN by an agreement with the master to sail the vessel on the shares, he to man the vessel, victual the crew, and pay the running expenses for one half of the gross earnings. The owners can be relieved by nothing short of an actual demise of the vessel, such as takes from them all possession, authority, or control. *Id.*
7. LIABILITY OF OWNERS OF FISHING VESSELS IS NOT CONTROLLED AND LIMITED by the provisions of the United States Statutes of 1884, chapter 121, section 18, which enacts that "the individual liability of a ship-owner

shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole." *Simpson v. Story*, 480.

8. WHERE STEAMSHIP COMPANY BECOMES BOUND BY LAW OR BY CHOICE TO PROVIDE SURGEON FOR ITS SHIPS, its duty to passengers demands the selection of a reasonably competent man for that office, and it is liable for a neglect of that duty. But the company is responsible solely for its own negligence in the selection of a surgeon, and is not liable for the negligence of the surgeon employed. *Laubheim v. De K. N. S. Co.*, 815.

STATUTE OF FRAUDS.

1. CONTRACT VOID UNDER STATUTE OF FRAUDS CANNOT BE USED FOR ANY PURPOSE, and is regarded as a nullity. *Ramb v. Smith*, 619.
2. NOT ONLY IS VERBAL CONTRACT FOR SALE OF LANDS VOID, but a verbal agreement by one to purchase an interest in lands for another is void. *Id.*
3. VERBAL AGREEMENT TO FORM COPARTNERSHIP INVOLVING PURCHASE OF LANDS for the purposes of the copartnership business includes a contract for the sale of land, and is void under the statute of frauds. *Id.*
4. STATUTE OF FRAUDS CANNOT BE SET UP TO DEFEAT ACTION UPON QUANTUM MERUIT for services rendered by the plaintiff's minor son under an express verbal contract, by which it was agreed that the son should work in the defendant's office for two years, and receive instruction in dentistry, and at the end of that time have his tuition fees paid in a dental college, but before the expiration of that time the son became unwilling to remain longer under the contract, and asked that a certain sum be paid him for his services thereafter, which was done. *Freeman v. Foss*, 467.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS RUNS AGAINST WEAK-MINDED PERSON, whose mental infirmity does not amount to idiocy nor lunacy, from the time of the discovery of a cause of action based upon fraud, such fraud having been explained to him so that he was made to understand it, though with some difficulty. *Piper v. Hoard*, 785.
2. STATUTE OF LIMITATIONS ONCE SET IN MOTION continues to run, notwithstanding undue influence exercised by the defendant over plaintiff, the latter being weak-minded, but not an idiot nor lunatic. *Id.*
3. STATUTE OF LIMITATIONS IS PROPERLY PLEADED, when to a complaint seeking relief on the ground of fraud the answer pleads that the cause of action did not accrue within six years before the commencement of the action. *Id.*
4. ACKNOWLEDGMENT IN WRITING SUFFICIENT TO TAKE CASE OUT OF STATUTE OF LIMITATIONS may consist of an order drawn by the debtor in favor of the creditor, and requesting a third person to pay the latter a sum named in such order. *Manchester v. Braedner*, 828.
5. ORAL EVIDENCE IS ADMISSIBLE TO IDENTIFY DEBT TO WHICH ACKNOWLEDGMENT, relied upon to take a demand out of the statute of limitations, relates. *Id.*
6. WRITING, TO CONSTITUTE ACKNOWLEDGMENT SUFFICIENT TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS, must recognize the debt as existing, and contain nothing inconsistent with an intention on the part of the debtor to pay it. *Id.*

STATUTES.

1. TERMS "TO REGULATE" AND "TO PROHIBIT" ARE NOT SYNONYMOUS *People v. Gadway*, 578.
2. AMENDATORY ACT WHICH IS HIGHLY PENAL IN ITS CHARACTER precludes a liberal construction of the title of the original act, such as would extend it to objects not within the meaning of the language employed. *Id.*
3. CONSTITUTIONAL LAW—AMENDMENT NOT WITHIN TITLE OF ORIGINAL ACT. — An act entitled "An act to regulate the sale of spirituous liquors," etc., was amended by adding a new section prohibiting absolutely the sale of such liquors within certain specified limits. *Held*, that the amendment was not embraced in the title of the original act, and therefore was unconstitutional and void. *Id.*
4. CONSTITUTIONAL LAW. — Entire statute need not be set forth in an act amending it by adding new sections or altering old ones. It is only when all the sections of a statute are amended that the entire act, as amended, must be set out in the amendatory statute. *State v. Thurston*, 720.

See CONSTITUTIONAL LAW.

STOCK.

See CORPORATIONS.

STOPPAGE IN TRANSITU.

See COMMON CARRIERS, 11, 12; SALES.

SURETYSHIP.

SURETY ON JOINT AND SEVERAL BOND EXECUTED TO HUSBAND BY WIFE AS PRINCIPAL OBLIGOR CANNOT SET UP INCAPACITY of the principal to contract with her husband as a defense to an action on the bond. *Wiss v. Sanford*, 461.

See DURESS, 1; MORTGAGES, 4, 5.

TAXATION.

1. IN SUIT TO FORECLOSE MORTGAGE, PARTIES MAY LITIGATE VALIDITY OF TAX TITLE asserted by the holder of a junior lien to give him an absolute title to the land, discharged from the lien of the mortgage, where the holder of such junior lien has been made a party defendant in the suit. *Wilson v. Jamison*, 635.
2. HOLDER OF JUDGMENT LIEN JUNIOR TO MORTGAGE CAN, BY PURCHASING AT TAX SALE, ACQUIRE, as against the mortgagee, a title divesting the lien of the mortgage. (By equally divided court.) *Id.*
3. JUDGMENT, SALE, AND DEED OF LAND FOR TAXES, under the Missouri statutes of 1877, page 386, section 6, in order to bind the interests of the owner, must show that he was made a party, if known; and if not known and not made a party, then his interest can only be affected by making the party appearing by the record to be the owner a party to the suit. *Evans v. Robberson*, 701.

See ATTORNEY AND CLIENT, 3.

TELEGRAPHS.

1. OMISSION OF MATERIAL WORD IN TRANSMISSION OF TELEGRAPHIC MESSAGE raises a presumption, in the absence of proof to the contrary, that the

mistake resulted from the fault of the telegraph company. *Allen v. Western Union Tel. Co.*, 353.

2. **STIPULATION IN TELEGRAPH BLANKS** that the company shall not be liable for mistakes or delays in transmission, delivery, or non-delivery of unreported messages, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the message, is void as against public policy. *Id.*
3. **AS BETWEEN SENDER AND INNOCENT RECEIVER OF TELEGRAM**, the party who selects the telegraph as means of communication must bear any loss occasioned by errors in transmission on the part of the telegraph company. But the sender can recover his loss from such company. *Id.*
4. **AS BETWEEN SENDER AND RECEIVER OF TELEGRAM** in which an error is made by the telegraph company, the telegram received is the original and best evidence of the contract binding on the sender. *Id.*
5. **TELEGRAPH COMPANY, LIABILITY OF—MEASURE OF DAMAGES.**—A telegraph company is liable for damage resulting naturally, and in the usual course of business, from its failure to send or deliver a dispatch correctly and promptly, without requiring the sender to disclose its importance to the company or its agent. *Western Union Tel. Co. v. Hyer*, 222.
6. **CIPHER DISPATCH.**—It is of no consequence whether the dispatch is in plain English or in cipher, provided such cipher is written in the letters of the English alphabet. *Id.*

See CONSTITUTIONAL LAW, 13.

TRADE-MARKS.

1. **PARTY WHO HAS SIMULATED ANOTHER'S TRADE-MARK IS IN NO CONDITION TO COMPLAIN** of a third party for simulating the trade-mark that he himself is using in fraud of the original owner's rights. *Parlett v. Guggenheimer*, 416.
2. **RIGHT OF PARTY TO HAVE HIS TRADE-MARK PROTECTED IS FORFEITED** by his stamping upon his goods, in connection with such trade-mark, representations which are untrue, intended to mislead the public into a belief that his goods have an origin other than the true one. And where such forfeiture has once been declared by a court having jurisdiction of the subject-matter and of the parties, the production of that record will be sufficient for the same purpose in every other court. While he may thereafter continue to use such trade-mark, his right of exclusive use is gone from him forever, and the right to the exclusive use which he himself cannot assert, no other person can assert for him. *Id.*
3. **WHERE FIRST PERSON TO USE WORDS "GOLDEN CROWN" AS TRADE-MARK HAS FORFEITED HIS RIGHT** to the exclusive use thereof, another person may use those words, in connection with other devices, to constitute a trade-mark of his own, and is entitled to an injunction to restrain a third person from infringing such trade-mark by using an imitation of it so close as to mislead the ordinary purchaser, there being convincing proof that the similarity is the result of design, and not of accident. *Id.*

TRESPASS.

1. **PLAINTIFF IN TRESPASS QUARE CLAUSUM FREGIT IS NOT BOUND TO GIVE AFFIRMATIVE PROOF** that he has sustained any particular amount of damage. Every unauthorized entry upon the land of another is a trespass, which entitles the owner to a verdict for some damages, although

they may, under some circumstances, be so small as to be merely nominal. *Baltimore etc. R. R. Co. v. Boyd*, 362.

2. TREBLE DAMAGES, UNDER SECTION 7957, HOWELL'S STATUTES OF MICHIGAN, FOR CUTTING TIMBER ON LAND OF ANOTHER, are in their nature punitive, and are not designed to be inflicted in any case not involving something like willful wrong. They cannot arise from mere neglect, but must come from active misconduct. *Michigan Land etc. Co. v. Deer Lake Co.*, 491.
3. BURDEN OF PROOF OF SHOWING THAT TRESPASS WAS CASUAL AND INVOLUNTARY IS UPON DEFENDANT, where treble damages are claimed by the plaintiff, under section 7957, Howell's Statutes of Michigan, for cutting timber on his land. *Id.*
4. MEASURE OF DAMAGES FOR TIMBER CUT BY TRESPASSER ON LAND OF ANOTHER, BUT NOT REMOVED, is the value of the timber standing, where the owner did not refuse to allow the timber to be removed by the trespasser, and where he tried to sell the timber, but could not, and subsequently it was destroyed by fire, although it seems if the owner had refused to permit the trespasser to remove the timber, its value upon the ground would then have been deducted. *Id.*
5. RIGHT TO SUE FOR DAMAGES TO REAL ESTATE is not destroyed nor assigned by a subsequent conveyance of such real property. *Lancaster v. Connecticut etc. Ins. Co.*, 739.
6. DECLARATIONS MADE BY COUNSEL WHILE ARGUING QUESTION OF DAMAGES before a jury of condemnation of the property in question cannot be admitted in evidence in a subsequent action of trespass *quare clausum fregit*, for the purpose of showing malice on the part of the defendant, and thereby enhancing the damages. *Baltimore etc. R. R. Co. v. Boyd*, 362.

TRUSTS AND TRUSTEES.

1. ONE MAY BE CONSTITUTED TRUSTEE, EX MALIFICIO, IN FAVOR OF PERSON NOT IN ESSE, by fraudulent representations, if the latter merely seeks to obtain property which the former holds by virtue of his fraud, and which the latter would be entitled to hold if the representations had been true. *Piper v. Hoard*, 789.
2. TRUSTEE, WHO IS BENEFICIARY'S SON, MAY BE REMOVED, on application of beneficiary, because a state of mutual hostility has arisen between them since the creation of the trust, attributable in part to the fault of the trustee, and which would naturally pervert the feelings and judgment of the trustee, who is given full power to determine what allowance the beneficiary shall have, limited only by the duty of exercising a fair and reasonable discretion, although there is no distinct proof of misconduct in consequence of such hostility. *Wilson v. Wilson*, 477.

See BONA FIDE PURCHASERS; CORPORATIONS, 6; MORTGAGES, 14.

USAGE.

See NEGOTIABLE INSTRUMENTS, 10.

VENDOR AND VENDEE.

1. CONTRACT OF PURCHASE TRANSFERS TO GRANTEE the equitable right to the property, subject to the grantor's lien for the remaining unpaid purchase-money. Under contract of purchase, grantee can compel grantor to make conveyance of legal title when the purchase-money is paid. *Burke v. Johnson*, 252.

2. **INTEREST OF VENDOR WHO HAS MADE CONTRACT OF SALE** and received part of the purchase-money is not subject to attachment or execution, though he retains the legal title. The vendee may, therefore, safely pay him the balance of the purchase-money, though the property has, in the mean time, been attached under a writ against the vendor. *Id.*

See ATTACHMENTS, 1.

WARRANTY.

See SALES.

WATERS.

See ICE; MUNICIPAL CORPORATIONS.

WILLS.

1. **TO ESTABLISH UNDUE INFLUENCE SUFFICIENT TO AVOID WILL**, the circumstances of its execution need not be inconsistent with every other hypothesis. All that is necessary is, that the evidence of the party attacking the will of a person of sound mind, on the ground of undue influence, shall preponderate over the evidence adduced and the presumptions prevailing on behalf of the proponents of the will. *Gay v. Gilligan*, 712.
2. **MEANS BY WHICH UNDUE INFLUENCE** over a testator is acquired are immaterial. *Id.*
3. **UNDUE INFLUENCE**. — Persuasion, appeals to the affections, of ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, and the like, do not constitute undue influence. But pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is used or threatened. *Id.*
4. **IF UNDUE INFLUENCE IS ONCE SHOWN TO EXIST**, every gift from the weaker party to the stronger is presumptively tainted by such influence; and the recipient must assume the burden of establishing its fairness and validity. *Id.*
5. **EQUITY WILL RELIEVE AGAINST FRAUD IN PROCURING WILL**, if the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in obtaining the consent of the next of kin to the probate of the will. *Id.*
6. **EXISTENCE OF CONFIDENTIAL OR FIDUCIARY RELATIONS** imposes upon the recipient of a gift the *onus* of establishing its absolute fairness. In the presence of such relations, a court of equity will presume confidence placed and influence exerted. *Id.*
7. **DISINHERITING BY TESTATOR OF SOME OF HIS CHILDREN**, without apparent cause, imposes upon those claiming under the will the necessity of giving some reasonable explanation of its unnatural character. *Id.*

8. LEGACIES OF SPECIFIC NATURE are paid before general ones. *Cock v. Cock*, 161.
9. REQUEST OF "ALL MY PERSONAL ESTATE" means the balance of personal estate after the payment therefrom of testator's debts, and other legal charges. *Id.*
10. SPECIFIC LEGACIES ARE SUCH ONLY AS DESIGNATE PARTICULAR THINGS, or things by a particular description. *Id.*
11. REQUEST OF ALL A MAN'S PERSONAL PROPERTY is not a specific legacy. Its import is the same as is expressed by the words, "rest and residue." *Id.*
12. REQUEST OF "BANK STOCK" IS TO BE CONSTRUED AS DESCRIBING TESTATOR'S DEPOSITS IN VARIOUS SAVINGS BANKS, he having no shares of stock of any bank, nor any other property in banking associations. *Tomlinson v. Bury*, 464.
13. LEGACY IS SPECIFIC, AND NOT GENERAL, when it is of "all the mill stock and bank stock remaining in my name after the decease of my said wife." *Id.*
14. WHERE HUSBAND BY WILL DEVISES REAL ESTATE to his wife, which she accepts, it must be taken in lieu of dower out of the lands of which he died seised, unless by his will he otherwise declared. *Kane v. Gross*, 767.
15. WORDS "DIE WITHOUT ISSUE OF HIS BODY LAWFULLY BEGOTTEN," IN WILL, must be construed to mean a definite failure of issue, and will support a limitation over, if other words in the will do not prevent this result. *Combs v. Combs*, 359.
16. DEVISE TO PERSON AND HEIRS OF HIS BODY LAWFULLY BEGOTTEN, WITH FULL POWER and authority to sell and convey the estate devised in his lifetime, or to dispose of it by last will and testament, gives to the devisee an absolute and unqualified fee which is not determinable on any event whatsoever, and a limitation over in such case is void, because it is inconsistent with the absolute property given to the devisee first named. *Id.*
17. EXECUTORY DEVISE MAY BE LIMITED AFTER FEE-SIMPLE; but in such case, the fee must be made determinable on some contingent event. It must be provided that the fee is to cease, and the executory devise to vest, on a contingency that must happen, if at all, within a life or lives in being, and twenty-one years and a fraction thereafter. *Id.*
18. REQUEST TO CHURCH, "INTEREST, INCOME, OR PROCEEDS THEREOF TO BE APPLIED TO THE SUNDAY SCHOOL belonging to or attached to said church," is sufficiently definite and certain in respect to the objects thereof, and capable of being enforced, where the Sunday school is shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church, although such Sunday school is not itself a corporate body. *Eutaw Place Baptist Church of Baltimore City v. Shively*, 412.
19. IN CONSTRUING WILL, TESTATOR'S PARTICULAR INTENT, SHOWN BY SINGLE PROVISION STANDING BY ITSELF, MUST YIELD to the general leading intent, as manifested in the whole instrument. *Phelps v. Bates*, 92.
20. WORD "OR" SHOULD BE CONSTRUED "AND" IN CLAUSE IN WILL, whereby the testator gave his son certain estate, with a gift over, if he should die "during minority or without issue"; and the estate would become infeasible in the son, at least as soon as he attained his majority. *Id.*

See CONTRACTS, 9, 10; DEEDS, 2, 3; ESTATES OF DECEDENTS.

WITNESSES.

1. WITNESSES MAY BE COMPELLED BY STATE to attend court and give their evidence without compensation. *Bennett v. Kroth*, 248.
2. WITNESSES ON BEHALF OF DEFENDANT CHARGED WITH CRIME, whom he requests or compels to attend court, are entitled to recover of him for their services as such witnesses. *Id.*
3. WITNESS, WHO IS SWORN AND GIVES SOME EVIDENCE, HOWEVER FORMAL, IS TO BE CONSIDERED WITNESS FOR ALL PURPOSES, and is subject to cross-examination upon all matters material to the issue. *People v. Barker*, 501.
4. SURVIVING PARTY TO TRANSACTION WILL NOT BE PERMITTED TO TESTIFY against a deceased party or his assignee or representative, on the ground that others were jointly interested with the decedent in the transaction, if none of them participated in the transaction, or are able to testify concerning it. *Harris v. Bank of Jacksonville*, 201.
5. WITNESS DOES NOT WAIVE HIS PRIVILEGE, nor become a voluntary witness, by answering criminating questions without objection, or protest, where under the statute he is obliged to answer. He is not required to go through the formality of an objection which, however made, would be useless. *People v. Sharp*, 851.
6. WITNESS TESTIFYING BEFORE COMMITTEE OF LEGISLATURE, with respect to a charge of bribery in which he is implicated, must be regarded as testifying against another person so offending, upon a "trial, hearing, proceeding, or investigation," within the meaning of section 79 of the Penal Code. *Id.*
7. PROVISION THAT NO PERSON SHALL BE COMPELLED TO BE WITNESS against himself in a criminal case does not inhibit the enactment of a statute requiring any person offending against the statute concerning bribery to attend and testify as a witness upon any trial, hearing, proceeding, or investigation against any other person so offending, but declaring that "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying"; and further declaring that a person so testifying to the giving of a bribe which has been accepted, "shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such indictment or prosecution." *Id.*
8. WITNESS IS NOT PRIVILEGED FROM ANSWERING because his answer would expose him to disgrace and infamy, if the case is so situated that he cannot be exposed to the danger of conviction and punishment, with respect to the matters disclosed by his answer. *Id.*

See ATTORNEY AND CLIENT, 4; CONSTITUTIONAL LAW, 16; CRIMINAL LAW; DEEDS, 13; EVIDENCE.

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